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THE

THIRD PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

THE

THIRD PART

OF THE

Institutes of the Laws of England;

CONCERNING

HIGH TREASON,

AND OTHER PLEAS OF THE CROWN.

AND

CRIMINAL CAUSES.

78439

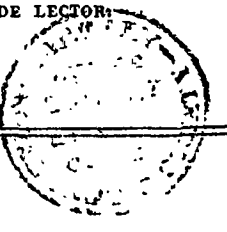
ECCLES. viii. 11.

Quia non profertur cito contra malos sententia, absque timore ullo filii hominum perpetrant mala.

Inertis est nescire quod sibi liceat.

AUTHORE EDWARDO COKE, MILITE, *J. C.*

HÆC EGO GRANDÆVUS POSUI TIBI, CANDIDE LECTOR.



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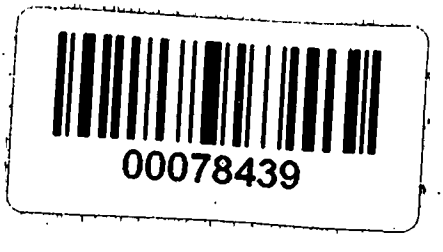

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DEO,

PATRIÆ,

TIBI.

A PROEME

TO THE

THIRD PART *of the* INSTITUTES.

IN the Second Part of the Inſtitutes we have ſpoken only of acts of parliament, (viz.) of Magna Carta, and many ancient and other acts of parliament, which we have explained, and therein obſerved which of them are declaratory of the ancient lawes of this realme, which are introductory of new, and which mixt: all of them (excepting a very few) concerning common pleas, and theſe two great pronouns, *meum* and *tuum*.

In this Third Part of the Inſtitutes, we are to treat *de malo*, viz. of high treaſon, and other pleas of the crowne, and criminall cauſes, moſt of them by act of parliament, and ſome by the common law: in which caſes the law of all other is moſt neceſſary to be knowne, becauſe it concerneth the ſafety of his majeſtie, the quiet of the common-wealth, and the life, honour, fame, liberty, blood, wife, and poſteritie of the party accuſed, beſides the forfeiture of his lands, goods, and all that he hath: for it is truly ſaid of theſe laws, *Reliquæ leges privatorum hominum commodis proſpiciunt, hæ regiæ majeſtati, ſubditorum vitæ, ac publicæ tranquillitati conſulunt.* And that in theſe caſes the ancient maxime of the law principally holdeth, *Miſera ſervitus eſt, ubi jus eſt vagum, aut incognitum.* And where ſome doth object againſt

See the 1. part of the Inſtitutes ſect. 500.

Malum non habet efficientem, ſed deficientem cauſam. Evill hath not an efficient, but a deficient cauſe, by reaſon of the want of ſome vertue or notable good.

Stamford.

againſt the lawes of England, that they are darke and hard to be underſtood, we have ſpecially in theſe and other parts of the Inſtitutes opened ſuch windowes, and made them ſo lightſome, and eaſie to be underſtood, as he that hath but the light of nature, (which Solomon calleth the candle of Almighty God, Prov. 20. 27.) adding induſtrie and diligence thereunto, may eaſily diſcerne the ſame. And that may be verified of theſe lawes, that *lex eſt lux*, Prov. 6. 23, the law itſelfe is a light. See Rom. 2. 14. And when we conſider how many acts of parliament (publiſhed in print) that have made new treaſons and other capitall offences, are either repealed by generall or expreſſe words, or expired: how many indictments, attainders of treaſons, felonies, and other crimes, which are not warrantable by law at this day: and how few book-caſes there have been publiſhed of treaſons, (though a ſubject of greateſt importance) and thoſe very ſlenderly reported: we in reſpect of the places which we have holden, and of our own obſervation, and by often conferences with the ſages of the law in former times concerning criminall cauſes or pleas of the crowne, have thought good to publiſh this third part of the Inſtitutes, wherein we follow that old and ſure rule, *Quod judicandum eſt legibus, et non exemplis.* A worke arduous, and full of ſuch difficultie, as none can either feele or beleeve, but he onely which maketh tryall of it. And albeit it did often terrifie me, yet could it not in the end make me deſiſt from my purpoſe; (eſpecially in this worke) ſo farre hath the love and honour of my country, to paſſe through all labours, doubts, and difficulties, prevailed with me.

This, as other parts of the Inſtitutes, wee have ſet forth in our Engliſh tongue, not onely for the reaſons in the preface to the firſt part of the Inſtitutes alledged, which we preſume may ſatisfie any indifferent and prudent reader: but ſpecially this treatiſe of the pleas of the crowne, becauſe, as it appeareth by that which hath been ſaid, it concerneth all the ſubjects of the realme more neerly by many degrees, then any of the other. Hereunto you may adde that which Robert Holcoth an Engliſh

Bal. cent. 3. fo. 148.

man

man ſurnamed *Theologus magnus*, upon the ſecond chapter of the book of Wiſdome, in or about the 20. yeare of king E. 3. wrote to this effect. *Narrant hiſtoriæ quod cum Willielmus dux Normannorum regnum Angliæ conquiſiviſſet, deliberavit quomodo linguam Saxonicam poſſit deſtruere, et Angliam, et Normanniam in idiomate accordari, et ideo ordinavit, quod nullus in curia regia placitaret niſi in Gallico, et iterum quod puer quilibet ponendus ad literas addiſceret Gallicum, et per Gallicum Latinum, quæ duo uſque hodie obſervantur. Hæc ille.* But the ſtatute of 35 E. 3. cap. 15. made not long after Holcoth wrote, hath taken theſe edicts of a conqueror away, and given due honour to our Engliſh language, which is as copious and ſignificant, and as able to expreſſe any thing in as few and apt words, as any other native language, that is ſpoken at this day. And (to ſpeake what we think) we would derive from the Conqueror as little as we could. 35 E. 3. ca. 15.

When Henry the firſt died, all the iſſue male of the Conqueror, and of his ſonnes were dead without iſſue male.

The wife of king H. 1. was Mawde daughter of Malcolme king of Scotland ſirnamed Canmor, and of Margaret his wife, who was the granchild of Edmond Ironſide king of England, viz. the ſaid king Edmond had iſſue Edward ſirnamed the Outlaw, becauſe he lived a long time beyond ſea with Salamon king of Hungary out of the extent of the lawes of this realme. Edward had iſſue the ſaid Margaret his eldeſt daughter, famous for her piety and vertue; ſhe had iſſue Mawde wife of king H. 1. who by her had iſſue Mawde, of whoſe Engliſh blood by Geffery Plantagenet earle of Anjou all the kings of England are lineally deſcended.

We have in this Third Part of the Inſtitutes cited our ancient authors, and bookes of the law, viz. Bracton, Britton, the Mirror of Juſtices, Fleta, and many ancient records, never (that we know) before publiſhed, to this end, that ſeeing the pleas of the crown are for the moſt part grounded upon, or declared by ſtatute

ſtatute lawes, the ſtudious reader may be inſtructed what the common law was before the making of thoſe ſtatutes, whereby he ſhall know, whether the ſtatutes were introductory of a new law, declaratory of the old, or mixt, and thereby perceive what was the reaſon and cauſe of the making of the ſame, which will greatly conduce to the true underſtanding thereof.

We ſhall firſt treat of the higheſt, and moſt hainous crime of high treaſon, *Crimen læſæ majeſtatis*; and of the reſt in order, as they are greater and more odious then others.

CAP. I.

OF HIGH TREASON.

BY the ſtatute of 25 E. 3. *de proditionibus*, is declared in certaine particular caſes, what offences ſhall be taken to be treaſon, with this reſtriction, that if any other caſe ſuppoſed to be treaſon ſhould happen before any juſtices, the juſtices ſhould tarry without going to judgment of the treaſon, till the caſe be ſhewed before the king and his parliament, whether it ought to be adjudged treaſon or other felony: therefore we will lay our foundation upon, and begin with that act of parliament, the letter whereof *in proprio idiomate* enſueth. 25 E. 3. cap. 2.

Divers opinions. *Ad fait declariſement.*

AVXINT pur ceo que divers opinions ount eſtre eins ceux heures qen caſe doit eſtre dit treaſon (1), *et en quel caſe nemi, le roy a le requeſt des ſeigniours et commons ad fait declariſment* (2) *que enſuiſt. Ceſtaſſavoire, quant home* (3) *fait compaſſer* (4) *ou imaginer* (5) *la mort* (6) *noſtre ſeignior* (7) *le roy* (8), *madame ſa compaigne* (9), *ou de lour fitzeigne et heire* (10), *ou ſi home violaſt la compaigne le roy* (11), *ou leigne file le roy nient marie* (13), *ou la compaigne leigne fitz* (12) *et heire le roy. Ou ſi home leve guerre enconter noſtre ſeignior le roy* (14) *en ſon realme, ou ſoit aidant as enemies noſtre dit ſeignior le roy en ſon realme, donnant a eux aid, ou comfort en ſon roialme, ou per aylours* (15), *et de ceo provablement ſoit attaint de overt fact per gents de lour condition* (16). *Et ſi home counterface le grand* (17), *ou privie ſeale le roy, ou ſa monye* (18). *Et ſi home apport faux money en ceſt roialme counterfait al mony dangliterre, ſicome la mony appelle* * *Luſheburgh, ou auter ſembleble a la dit mony dangliterre, ſachant le money eſtre faux* (19) *pur merchander ou payment faire en diſceite noſtre dit ſeignior le roy et de ſon people. Et ſi home tuaſt chancellor, treaſurer, ou iuſtices noſtre ſeignior le roy del un banke ou del auter, iuſtices in eire et daſſiſes, et touts auters iuſtices aſſignes de oier et terminer* †, *eſteaunts en lour places en feſants lour offices. Et ſoit a entendre que les caſes ſuiſnomes doit eſtre adjudge treaſon, que ſe extent a noſtre ſeigniour le roy et ſa roiall majeſtie: Et de tiel manner de treaſon la forfeiture des eſcheates appertenont a noſtre ſeignior le roy, cibien des terres et tenements tenus des auters, come de luy meſme* (20).

Nota, This is a law for the moſt part declaratory, but addeth alſo divers things to the ancient law.

* Luſheburghs, alias Luxenburghs were a kinde of baſe coine to the likeneſſe of our Engliſh money, ſo called, becauſe they were coined in Luſheburgh, which ſometime was an earledome, and after a dukedome. See Chaucer in the Prologue to the Monk's Tale, the hoſt ſpeaking to a luſty monk, ſaith, *God wot, no Luſhburghes pay ye*, that is (upon the coherence of the verſe) No payment make ye that is not f ll and currant.

† *Injuria illata judici ſeu locum tenenti regis videtur ipſe regi illata, maxime ſi fiat, in exercente officium.*

Item, WHEREAS divers opinions have been before this time, in what caſe treaſon ſhall be ſaid, and in what not; the king at the requeſt of the lords and of the commons, hath made a declaration in the manner as hereafter followeth: that is to ſay, when a man doth compaſſe or imagine the death of our lord the king, of my lady his queene, or of their eldeſt ſonne and heire: or if a man doe violate the kings compagnion, or the kings eldeſt daughter unmarried, or the wife of the kings eldeſt ſonne and heire: or if a man doe levie warre againſt our lord the king in his realme, or be adherent to the kings enemies in his realme, giving to them aide and comfort in the realme or elſewhere, and thereof be provably attainted of open deed by people of their condition. And if a man counterfeit the kings great or privie ſeale, or his money: and if a man bring falſe money into this realme counterfeit to the money of England, as the money called Lutheburgh, or other like to the ſaid money of England, knowing the money to be falſe, to merchandize or make payment, in deceipt of our ſaid lord the king and of his people. And if a man ſlay the chancellor, treaſurer, or the kings juſtices of the one bench or the other, juſtices in eire, or juſtices of aſſize, and all other juſtices aſſigned to heare and determine, being in their place doing their offices. And it is to be underſtood, that in the caſes above rehearſed, it ought to be judged treaſon, which extend to our lord the king and his royall majeſtie; and of ſuch treaſon the forfeiture of the eſcheates pertaineth to our lord the king, as well of the lands and tenements holden of others, as of himſelf.

And albeit nothing can concerne the king, his crowne, and dignity, more then *crimen læſæ majeſtatis*, high treaſon: yet at the requeſt of his lords and commons, the bleſſed king by authority of parliament made the declaration, as is above-ſaid: and therefore, and for other excellent lawes made at this parliament, this was called *benedictum parliamentum*, as it well deſerved. For except it be Magna Charta, no other act of parliament hath had more honour given unto it by the king, lords ſpirituall and temporall, and the commons of the realme for the time being in full parliament, then this act concerning treaſon hath had. For by the ſtatute of 1 H. 4. cap. 10. reciting that where at a parliament holden 21 R. 2. divers paynes of treaſon were ordained by ſtatute, in as much as there was no man did know how to behave himſelfe, to doe, ſpeak, or ſay, for doubt of ſuch paines: It is enacted by the king, the lords and commons, that in no time to come, any treaſon be judged otherwiſe, then it was ordained by this ſtatute of 25 E. 3. The like honour is given to it by the ſtatute of 1 E. 6. cap. 12. and by the ſtatute of 1 Ma. cap. 1. ſeſſ. 1. different times, but all agreeing in the magnifying and extolling of this bleſſed act of 25 E. 3. Of this act of 1 Mariæ, we ſhall ſpeak more hereafter.

1 H. 4. cap. 10.

1 E. 6. cap. 12.

1 Mar. cap. 1. Seſſ. 1.

hereafter. But to proceed to give a light touch how other acts of parliament have been called. The parliament holden at Oxford, *an.* 42. H. 3. was called *inſanum parliamentum.* 12 E. 2. the parliament of whitebands, *albarum fibularum* or *metellarum.* 5 E. 3. *parliamentum bonum.* 10 R. 2. *parliamentum quod fecit mirabila*, that wrought wonders. 21 R. 2. *magnū parliamentū.* 6 H. 4. *parliamentū indoctū*, lack-learning parliament. 4 H. 6. *parliamentū fuſtiū*, the parliament of bats. The ſeſſion of parliament in *an.* 14. H. 8. called the black parliament. The act of 1 E. 6. was called *parliamentū pium*, the pious parliament. And the ſaid act of 1 Mar. *parliamentū propitium*, the merciful parliament. The parliaments of queen Elizabeth ſtiled *pia, juſta, et provida.* The parliament holden *anno* 21 of king James, called *fœlix parliamentum*, the happy parliament. And the parliament holden in the third yeare of our [3] ſoveraigne lord king Charles, *benedictum parliamentum*, the bleſſed parliament. The ſeverall reaſons of theſe former appellations appeare of record and in hiſtory, and the latter are yet freſh in memory. At the making of the ſtatute of 25 E. 3. the high courts of juſtice were furniſhed with excellent men, *viz.* Sir William Shardſhill knight (ſhortly written in bookes Shard) lord chiefe juſtice of the kings bench, and his compagnions juſtices of that court; Sir John Stonor knight, commonly written in books Stone, lord chief juſtice of the court of common pleas, and his compagnions juſtices of that court; and Gervaſius de Wilford, lord chiefe baron of the exchequer, men famous in their profeſſion, and excellent in the knowledge of the lawes. At the making of the ſtatute of 1 H. 4. were Sir Walter Clopton knight, lord chiefe juſtice of the kings bench, and his compagnions juſtices of that court; and Sir William Thirning knight, lord chief juſtice of the court of common pleas, and his compagnions juſtices of that court; and Sir John Caſſie knight, lord chiefe baron of the exchequer; men equall to any of their predeceſſors in the knowledge of the lawes. At the making of the ſtatute of 1 E. 6. were Sir Richard Liſter knight, lord chiefe juſtice of the kings bench, and his compagnions juſtices of that court; and Sir Edward Montague knight, lord chiefe juſtice of the court of common pleas, and his compagnions juſtices of that court; and Sir Roger Cholmeley knight, lord chiefe baron of the exchequer; men of that excellency, as they were worthy of the name of The worthies of the law. At the making of the ſtatute of 1 Mar. were Sir Thomas Bromley knight, lord chiefe juſtice of the kings bench, and his compagnions juſtices of that court; and Sir Richard Morgan, knight, lord chiefe juſtice of the court of common pleas, and his compagnions juſtices of that court; and Sir D. Brook knight, lord chiefe baron of the exchequer, men renouned for their great knowledge and judgement in their profeſſion. All theſe we have named in the honour of

them, and of their families and posterities, for that they in their severall times were great furtherers of these excellent lawes concerning treason. *In memoria æterna erit justus.* And all this was done in severall ages, that the faire lillies and roses of the crowne might flourish, and not be stained by severe and sanguinary statutes. But let us come to the act it selfe, and for the better understanding thereof, and of the book-cases, and other records grounded upon the same: let us divide this act concerning high treason into severall classes or heads, and then prosecute the same in order.

The first concerneth death,	By compassing or imagining the death of the	King, Queene, Prince,	and declaring the same by some overt deed.
	By killing and murdering of the	Chancellor. Treasurer. Justices of the one Bench or other. Justices in eyre. Justices of assize. Justices of oier and terminer, &c.	In their places doing their offices.

The second concerneth, violation, that is, to violate or carnally to know	the kings consort, or queene. the kings eldest daughter unmarried. the princes wife.

The third is levying war against the king.

[4] The fourth is adhering to the kings enemies within the realme, or without, and declaring the same by some overt act.

The fifth is counterfeiting of	the great seale. the privie seale. the king's coyne.

The sixth and last, by bringing into this realme counterfeit money to the likenesse of the kings coine, &c.

So as treason is *membrum divisum*, and these severall classes or heads are *membra dividentia*. And if the offence be not within one of these classes or heads, it is no treason.

(1) *Treason*] is derived from [*trahir*] which is treacherously to betray. *Trahue*, betrayed, and *trahison*, *per contractionen*, treason, is the betraying it selfe.

Detegit imbelles animos, nil fortiter audens
Proditio.

Inter leges Canuti, fo. 118. ca. 61. *Proditiones* (Hlaꝼoꝺ ꝼpice) *numera-*

numerabantur inter ſcelera jure humano inexpiabilia. Treaſon is divided into two parts, *viz.* high treaſon, *alta proditio*, and into petit treaſon, *proditio parva.* The Latin word uſed in law is *proditio (à prodere)* and thereof cometh *proditorie*, which of neceſſity muſt be uſed in every indictment of treaſon, and cannot be expreſſed by any other word, periphraſis, or circumlocution.

(2) *Ad fait declariſement.*] This law is for the moſt part declaratory of the ancient law, and therefore this word *(declariſement)* is uſed. But yet the ſtudious reader ſhall obſerve, that in divers clauſes it addeth to the former law, whereunto this word *(declariſement)* will ſufficiently extend.

(3) *Quant home*, &c.] This extendeth to both ſexes, *homo* including both man and woman. This act is generall, and therefore extendeth to ſome perſons which claimed a priviledge to be exempted from ſecular juriſdiction. (For example,) [a] Adam de Orleton biſhop of Hereford was indicted of high treaſon for aiding the Mortimers, &c. with men, and armour againſt king E. 2, &c. Whereupon he was arraigned, and alledged *ſe abſque offenſa Dei, et ſanctæ eccleſiæ, et abſque licentia domini ſummi pontificis non poſſe nec debere reſpondere in hac parte.* And thereupon the archbiſhop of Canterbury, York, and Dublin, and their ſuffragans came to the barre, claimed his priviledge, and took him away; and he was ſo far from puniſhment, as he was after tranſlated to Worceſter, and after to Wincheſter. But this ſtatute (to cleare all doubts) extendeth to all perſons, * as well eccleſiaſticall as temporall, and ſo hath it ever ſince been put in execution, as hereafter in divers caſes it appeareth. See hereafter cap. Murdre et Larceny.

A man that is *non compos mentis*, as ſhall be ſaid more fully hereafter in the next ſection, or an infant within the age of diſcretion is not *(un home)* within this ſtatute; for the principall end of puniſhment is, that others by his example may feare to offend, *ut pœna ad paucos, metus ad omnes perveniat:* but ſuch puniſhment can be no example to mad-men, or infants that are not of the age of diſcretion. And God forbid that in caſes ſo penall, the law ſhould not be certaine; and if it be certaine in caſe of murder and felony, *à fortiori*, it ought to be certaine in caſe of treaſon.

If a man commit treaſon or felony and confeſſeth the ſame, or be thereof otherwiſe convict, if afterward he become *de non ſane memorie (qui patitur exilium mentis)* he ſhall not be called to anſwer: or if after judgement he become *de non ſane memorie*, he ſhall not be executed, for it cannot be an example to others.

And all aliens that are within the realme of England, and whoſe ſoveraignes * are in amity with the king of England, are within the protection of the king, and doe owe a locall obedience to the king, (are *homes* within this act) and if they commit high treaſon againſt the king, they ſhall be puniſhed as traytors, but otherwiſe it is of an enemy, whereof you may reade at large, lib. 7. Calvin's caſe, fol. 6, &c. and 17, &c.

(4) *Fait compaſſer.*] Let us ſee firſt what the compaſſing or imagining the death of a ſubject was before, and at the time of the making of this ſtatute, [a] when *voluntas reputabatur pro facto.* And [b] Bracton ſaith, that *ſpectatur voluntas et non exitus, et nihil intereſt utrum quis occidat, aut cauſam mortis præbeat.* So as when the law was ſo holden, he muſt *cauſam mortis præbere*, that is, declare the ſame

[a] Rot. Romana. 17 E. 2. m. 6. Rot. Clauſ. 1 E. 3. part 1. memb. 13. Artic. Cleri. 9 E. 3. cap. 15, & 16. Tr. 21 E. 3. coram rege Rot. 173. *Privilegium ſeculare non competit ſeditioſo equitanti cum armis, &c. ſecundum leges eccleſiæ.* 25 E. 3. ſtat. 1. cap. 4. which was before this act. Mich. 31 E. 3. coram rege Rot. 55. Buck. Abbot de Miſſeny. See in the Chap. of Clergy in what caſes the priviledge of clergy is taken away.

* To perſons eccleſiaſticall and temporall. Bract. lib. 3. 120, 121. 134, 135. Britton, 5. 18. Fleta, cap. 23. 30. Mirror, cap. 1. cap 2. § 11. de appeale de homicide, 3 E. 3. cor. 383. 25 E. 3. 42. cor. 139. 26 aſſ. 27. 3 H. 7. cap. 1. 3 H. 7. 1. 12. 21 H. 7. 31. 1. Mar. Dier. 104. Tr. 32 E. 1. Coram rege. 15. 8 E. 2. Corone. 369. 395. Cuſtum. de Norm. cap. 79. fo. 94, 95. 33 H. 8. cap. 20. 1 & 2 Mar. c. 10. To aliens.

* [5]

[a] See hereafter, cap. 73. Where and how *voluntas reputabatur pro facto*, by the ancient law and the change thereof.

[b] Bracton, fol

ſame by ſome open deed tending to the execution of his intent, or which might be cauſe of death, as juſtice [c] Spigurnel reporteth a caſe adjudged; that a man's wife went away with her avowterer, and they [d] compaſſed the death of the huſband, and as he was riding towards the ſeſſions of oier and terminer and gaole-delivery, they aſſaulted him and ſtroke him with weapons, that he fell downe as dead, whereupon they fled; the huſband recovered and made hue and cry, and came to the ſeſſions and ſhewed all this matter to the juſtices, and upon the warrant of the juſtices, they were taken, indicted, and arraigned; and, all this ſpeciall matter was found by verdict; and it was adjudged that the man ſhould be hanged, and the woman burnt. And Sir William Beresford, chiefe juſtice of the common pleas ſaid, that before him and his compagnions juſtices of oier and terminer and gaole-delivery, a youth was arraigned, for that he would have ſtolne the goods of his maſter, and came to his maſters bed, where he lay aſleepe, and with a knife attempted with all his force to have cut his throat; and thinking that he had indeed cut it, he fled, whereupon the maſter cried out, and his neighbours apprehended the youth; and all this matter being found by ſpecial verdict, in the end he was adjudged to be hanged, &c. *Quia * voluntas reputabitur pro facto.* So as it was not a bare compaſſing or plotting of the death of a man, either by word, or writing, but ſuch an overt deed, as is aforeſaid, to manifeſt the ſame. So as if a man had compaſſed the death of another, and had uttered the ſame by words or writing, yet he ſhould not have died for it, for there wanted an overt deed tending to the execution of his compaſſing. [e] But if a man had imagined to murder, or rob another, and to that intent had become *inſidiator viarum*, and aſſaulted him, though he killed him not, nor took any thing from him, yet was it felony, for there was an overt deed. But in thoſe days, in the caſe of the king, if a man had compaſſed, or imagined the death of the king (who is the head of the commonwealth) and had declared his compaſſing, or imagination by words or writing, this had been high treaſon, and a ſufficient overture by the ancient law. And herewith agree all our ancient books. Glanvil ſaith, *oum quis de morte regis, &c. infamatur, &c.*

Bracton in the title *de criminibus læſæ majeſtatis. Ipſe accuſatus præloquutus fuit mortem regis.* And Britton. fol. 16. *grand treaſon eſt a compaſſer noſtre mort.* and fo. 39. b. *cyface lencuſor ſon appeale &c. que il oyã meſme cẽi John pur parler tiel mort, ou tiel treaſon &c.* And Fleta ſaith in his title *de crimine læſæ majeſtatis, ſi quis mortem regis auſu temerario machinatus fuerit &c. quamvis voluntatem non perduxit ad effectum.* And the Mirror ſaith, *crime de majeſtie eſt un peche horrible fait al roy &c. p. ceux q. occirent le roy, ou compaſſant à faire.* And it will delight you (in reſpect of reverend antiquity) to heare a preſident of an appeale (which then and after was in uſe) of high treaſon, *en pleine pliam. &c. en temps roy Edmond en ceſtes parolx. Rocelyn icy dit vers Waligrot illonq. q. a tiel iour tiel anne del raigne de tiel roy, en tiel lieu vient celuy Waligrot a cẽi Rocelyn, et luy trova deſtre en compaỽy, et en aide enſemblement ove Atheling, Thurkild, Ballard, et autres de faire priſoner, ou en tache pur occire nr̃e ſeignior le roy Edmond, ou en auter manner p. coupe felonioufment, et a ceo faire fuer' entreinrẽt a ceo counſel celer, et a ceo felony iſſint fornit ſelonq. lour poier.* By all which it is manifeſt, that compaſſing, machinating, counſelling, &c.

to

[c] 15 E. 2. tit. Cor. 383.

[d] Note this word [compaſſed.]

* *Sed hæc voluntas non intellecta fuit de voluntate nudis verbis, aut ſcriptis propalata, ſed mundo manifeſtata fuit per apertum factum, id eſt, cum quis dederat operam, quantum in ipſo fuit, ad occidendum, et ſic de ſimilibus.*

[e] *Inſidiator viarum.* See hereafter, cap. 5. De Hereſie. 25 E. 3. 42. 27. aſſ. p. 38. 4 H. 4. ca. 2. 13 H. 4. 7. per Gaſcoign. But ſee 9 E. 4. fo. 26. *Inſidiator viarum* without taking of ſomewhat, reſolved to be no felony. V. lib. 11. fo. 29. b. Al. Poulter's caſe. Vid. poſtea cap. 16. Robbery, in fine. Glanvil, lib. 14. cap. 14. lib. 1. c. 2. Bract. lib. 3. f. 118. Britton, fol. 16. & 39. b. Note the word *Compaſſe.* Fleta, lib. 1. c. 21. Mirr. cap. 1. § 5. cap. 2. § 11. Note this word *Compaſſe.* Mirror, c. 2. § 11. De lappeale de majeſtie. Rot. pat. 25 E. 3. part 1. m. 16. Vide Mic. 4 H. 4. Coràm rege. Rot. 22. See hereof more in the 57 cha. of Appeales. Bracton, Britton, Fleta, &c.

to kill the king, though it hath no other declaration thereof but by words, was high treaſon by the common law. And ſee hereafter, *verb. per overt fait, et de ceo provablement, &c.*

(5) *Fait compaſſer ou imaginer.*] So as there muſt be a compaſſing or imagination, for an act done *per infortunium*, without compaſſing, intent, or imagination, is not within this act, as it appeareth by the expreſſe words thereof. *Et actus non facit reum, niſi mens ſit rea.* And if it be not within the words of this act, then by force of a clauſe hereafter, *viz. Et pur ceo que pluſors autres, &c.* It cannot be adjudged treaſon, untill it be declared treaſon by parliament, which is the remedie in that caſe, which the makers of the law provided in that caſe. This compaſſing, intent, or imagination, though ſecret, is to be tryed by the peers, and to be diſcovered by circumſtances precedent, concomitant, and ſubſequent, with all endeavour evermore for the ſafety of the king. This was the caſe of Sr. Walter Tirrel a French knight, who the firſt day of Auguſt *ann.* 13 Williel. 2. *ann. dom.* 1100 being a hunting with the king in the new foreſt, was commanded by the king to ſhoot at a hart, *exiit ergo telum volatile, et obſtante arbore in obliquum reflexum faciens, per medium cordis regem ſauciavit, qui ſubito mortuus corruit.*

Regula.

Mat. Par. pa. 51. Holling. pa. 26. b. Mat. Weſtm. W. Malmeſbury.

It appeareth alſo by the Cuſtumer of Normandy, treating of treaſon, and the expoſition of the ſame, that this act was not treaſon. To calculate or ſeek to know by ſetting of a figure or witchcraft, how long the king ſhall raigne or live, is no treaſon, for it is no compaſſing, or imagination of the death of the king, within this ſtatute of 25 E. 3. and this appeareth by the judgment of the parliament in 23 Eliz. whereby this offence was made felony during the life of queen Eliz. which before was puniſhable by fine and impriſonment.

Cuſtum. de Nor. cap. 14. Vide inter Indictamenta de 17 E. 4. de Th. Burdit. al. ſed judicandum eſt legibus, et non exemplis. 23 Eliz. cap. 2.

The ancient law was, that if a mad man had killed or offered to kill the king, it was holden for treaſon; and ſo it appeareth by king Alfred's law before the conqueſt, and in lib. 4. in Beverlyes caſe. But now by this ſtatute and by force of theſe words, *fait compaſſer ou imaginer la mort*, he that is *non compos mentis* and totally deprived of all compaſſings, and imaginations, cannot commit high treaſon by compaſſing or imagining the death of the king: for *furioſus ſolo furore punitur:* but it muſt be an abſolute madneſſe, and a totall deprivation of memorie. And this appeareth by the ſtatute of 33 H. 8. for thereby it is provided, that if a man being *compos mentis* commit high treaſon, and after accuſation, &c. fall to madneſſe, that he might be tryed in his abſence, &c. and ſuffer death, as if he were of perfect memory: for by this ſtatute of 25 E. 3. a mad man could not commit high treaſon. It was further provided by the ſaid act of 33 H. 8. that if a man attainted of treaſon became mad, that notwithſtanding he ſhould be executed; * which cruell and inhuman law lived not long, but was repealed, for in that point alſo it was againſt the common law, becauſe by intendment of law the execution of the offender is for example, *ut pœna ad paucos, metus ad omnes perveniat*, as before is ſaid: but ſo it is not when a mad man is executed, but ſhould be a miſerable ſpectacle, both againſt law, and of extreame inhumanity and cruelty, and can be no example to others.

* *Inter leges Alveredi*, cap. 4. lib 4. fo. 124. Beverlie's caſe. Ovid. *Scilicet in ſuperis etiam fortuna luenda eſt. Nec veniam l. eſo numine, caſus habet.*

33 H. 8. cap. 20. * 1 & 2 Ph. and Mar. ca. 10. a Bract. lib. 3. fo. 118. Britton, cap. 8. a diſheriter. Glanv. lib. 1. cap. 2. Fleta, lib. 1. cap. 21. Mirror, ca 1. § 5 *Vers ray de la tre.*

[a] 13 Eliz. cap. 1. nota declared. Brook, tit. treaſon, 24. [b] 1 H. 4. 1. 19 H. 6. 47. 13 H. 8. 12. *vide infra verb.* (16) *Per overt fait.*

(6) *Mort.*] [a] He that declareth by overt act to depoſe the king, is a ſufficient overt act to prove, that he compaſſeth and imagineth the death of the king. And ſo it is to [b] impriſon the king, or to take the king into his power, and manifeſt the ſame by ſome overt act, this is alſo a ſufficient overt act for the intent aforeſaid. But peruſe adviſedly the ſtatutes of 13 Eliz. cap. 1. 2. & 14 Eliz. cap. 1.

3 Mar. Dier. 131. pl. 7.

(7) *Nrē ſeignior le roy.*] Theſe words extend to all his ſucceſſors, as it hath been alwayes taken.

[7]

(8) *Le roy.*] Is to be underſtood of a king regnant, and not of one that hath but the name of a king, or a nominative king, as it was reſolved in the caſe of king Phillip, who married queen Mary, and was but a nominative king, for queen Mary had the office and dignity of a king, ſo as ſhe that wanted the name of a king, but had the office and dignity, was within this act of 25 E. 3. And hee that had the name, and not the office and dignity of the king was not within it. And therefore an act was made, that to compaſſe or imagine the death of king Phillip, &c. during his marriage with the queen, was treaſon. A queen regnant is within theſe words *(nrē ſeignior le roy)* for ſhe hath the office of a king.

1 & 2 Phi. and Mar. cap. 10.

Vide 11 H. 7. c. 1.

This act is to be underſtood of a king in poſſeſſion of the crowne, and kingdom: for if there be a king regnant in poſſeſſion, although he be *rex de facto, et non de jure*, yet is he *ſeignior le roy* within the purvien of this ſtatute. And the other that hath right, and is out of poſſeſſion, is not within this act. Nay if treaſon be committed againſt a king *de facto, et non de jure*, and after the king *de jure* commeth to the crowne, he ſhall puniſh the treaſon done to the king *de facto*: and a pardon granted by a king *de jure*, that is not alſo *de facto*, is voyde.

4 E. 4. 1. 9 E. 4. 1. 2.

If the crown deſcend to the rightfull heire, he is *rex* before coronation: for by the law of England there is no *interregnum*: and coronation is but an ornament or ſolemnity of honour. And ſo it was reſolved by all the judges Hil. 1 Ja. in the caſe of Watſon and Clarke ſeminary prieſts: for by the law there is alwayes a king, in whoſe name the lawes are to be maintained, and executed, otherwiſe juſtice ſhould faile. Divers kings before the conqueſt voluntarily renounced their kingly office: and ſo did king H. 2. in the 16. yeare of his reigne, and Henry his ſonne was created and crowned.

Hil. 1 Ja. in the caſe of Watſon and Clark ſeminary prieſts. 9 E. 4. 1. b.

It appeareth by Britton, that to compaſſe the death of the father of the king, is treaſon, and ſo was the law holden long after that: for after king E. 2. had diſmiſſed himſelfe of his kingly office, and duty, and his ſonne by the name of E. 3. was crowned, and king regnant, thoſe curſed caitifs, Thomas Gourny, and William Ocle, and others were attainted of high treaſon for murthering the king's father, who had been king by the name of E. 2. and had judgement to be drawne, hanged, and quartered.

See the preamble, *Auxint pur ceo que divers opinions cunt eſtre eins ceux heures, que cen caſe doit eſtre dit treaſon, et in quel caſe nemi.* Rot. parliam. 4 E. 3. num. 5. * Eodem rot. num. 3. and 4.

* The like judgement was given againſt Sir John Matrevers knight, and others, as being guilty of the death of the king's uncle, Edmond earl of Kent, which at that time (being ſo neer of the bloud royall) was by ſome holden alſo treaſon. But now this act of 25 E. 3. hath reſtrained high treaſon in caſe of death *(al nrē ſeignior le roy, ſa compaigne, et al eigne fitz, et heire le roy.*

Plac. in parliam. E. 1. *anno regni ſui*, 33 North. Rot. 17. & 22.

Nicholas de Segrave was charged in open parliament *in præſentia dni. reg. comitum, barunum, et aliorum de conſilio regis tunc ibi exiſtent'*, that

that the king in the warre of Scotland being amongſt his enemies, Nicholas Segrave his liege man, and holding of the king by homage, and fealty, ſerved him for his aid in that warre, did maliciouſly move contention and diſcord without cauſe, with John de Crombewell, charging him with many enormous crimes, and offered to prove it upon his body. To whom the ſaid John anſwered, that he would anſwer him in the king's court, as the court ſhould conſider, &c. and thereupon gave him his faith. After Nich. withdrew himſelfe from the king's hoſt, and from the king's aid, leaving the king amongſt his enemies, *in periculo hoſtium ſuorum*, and adjourned the ſaid John to defend himſelf in the court of the king of France, and prefixed him a certaine day, *et ſic quantum in eo fuit, ſubjiciens, et ſubmittens dominium regis, et regni ſubjectioni dni. regis Franciæ, ad hoc faciendum, iter ſuum arripuit uſque Dovoriam, ad transfretandum, &c.* All which the ſaid Nich. confeſſed, *et voluntati dni. regis de alto et baſſo inde ſe ſubmiſit. Et ſuper hoc dns. rex volens habere aviſamentum comitum, baronum, magnatum, et aliorum de conſilio ſuo, injunxit eiſdem in homagio, fidelitate, et ligeantia quibus ei tenentur, quod ipſum fideliter conſulerent, qualis pœna pro tali facto ſic cognito fuerit infligenda: qui omnes, habito ſuper hoc diligenti tractatu, et aviſamento, conſideratis, et intellectis omnibus in prædicto facto contentis, &c. dicunt quod hujuſmodi factum meretur amiſſionem vitæ et membrorum, &c.* So as this offence was then ſolemnely in parliament adjudged high treaſon. But this is taken away by this act of 25 E. 3. being not under any of the claſſes, or heads ſpecified in this act. [8]

So piracy by any of the king's ſubjects upon another, was taken to be treaſon before this act, for ſo is the book to be intended, becauſe a pirat is *hoſtis humani generis*. But by this act it is not now to be judged treaſon. See hereafter in the chapter of Piracy. 40 Aſſ. 25.

One doth marie a queen regnant, if the huſband compaſſe the death of the queene, and declare the ſame by overt act, he is guilty of treaſon, and puniſhable by this act, for to this and many other purpoſes ſhe is a diſtinct perſon by the common law. And ſo if a queene wife of a king regnant, compaſſe the death of the king, and declare the ſame by overt act, ſhe is guilty of treaſon, and puniſhable by this act. So as (that we may ſpeak it once for all) by theſe and many others that might be cited, (ſome whereof ſhall hereafter be touched) the preamble of this act appeareth to be true, that divers opinions had been before the making of this act, what offences ſhould be adjudged high treaſon, and what not. Britton, cap. 8. and other ancient authors *ubi ſupra*.

This ſtatute having reſtrained the compaſſing, &c. of death to the king, queen, and prince, it came to paſſe after the making of this act, that in 3 R. 2. two citizens of London, John Kerby, mercer, and John Algore, grocer conceiving malice againſt John Impediall Janevois of S. Mary in Genoa that came as ambaſſadour from the ſtate of Genoa to the king (under the king's letters of ſafe conduct, for alliance to be had betweene the king and the duke and comminalty of Genoa aforeſaid) for that the ſaid John Imperiall had obtained a * monopolie to furniſh this land (keeping his ſtaple at Southampton) of all ſuch wares as came from the Levant, ſo plentifully as was to be had in all the weſt parts of Chriſtendome, the ſaid John Imperiall was killed by them, as more at large appears by the record. And albeit the ſaid John Imperiall was an ambaſſadour Rot. parlia. 3 R. 2. num. 18. See placita coram rege Hill. an. 3 R. 2. (Cavendiſh) rot. 8. London Holl. cron. 3 R. 2. pa. 422. 60. b. &c. * Monopoly. *nota* his end.

ſadour under the king's ſafe conduct, and the killing of him was *juſti belli cauſa*, yet the killing of him was no treaſon, becauſe it was not under any of the ſaid claſſes or heads, until it was at that time declared by parliament in theſe words, *quel caſe examine et diſpute inter les ſeigniors, et commons, et puis mre. al roy en pleine parliament, eſtoit illonques devant nre. ſeignior le roy declares, determinus et aſſentus, que tiel fait, et coupe eſt treaſon, et crime de royall majeſtie blemye, en quel caſe il ne doit allower a nulluy priviledge del clergie*, and accordingly the ſaid Kerby and Algore were attainted of high treaſon in the king's bench, Hill. 3 Rich. 2. *ubi ſupra:* but this declaration is taken away by the ſtatute of 1 Mariæ, as hereafter ſhall be ſaid, and yet of this declaration we ſhall make much uſe hereafter.

2 Regum, cap. 10. 4. 12. 31. The killing of a foreine ambaſſadour. *Honor legati, honor mittentis eſt, et proregis dedecus redundat in regem.*

22 Aſſ. p. 49. *Mort dun ambaſſad. le roy.*

In the 22 yeare of E. 3. which was about 3 yeares before the making of this act, one John at Hill had murdered A. de Walton the king's ambaſſadour, *nuncium dni. regis miſſ. ad mandatum regis exequendum:* this was adjudged high treaſon, for which he was drawne, hanged, and beheaded, &c. For true it is, *quod legatus ejus vice funditur, a quo deſtinatur, et honorandus eſt ſicut ille cujus vicem gerit, et legatos violare contra jus gentium eſt.* But by this act of 25 E. 3. it is reſtrained to the death *de ure. ſeignior le roy*, and therefore *proditx* is not within this ſtatute.

(9) *Sa compaigne.*] This word *compaigne*, (which is all one with conſort or wife) was uſed, that compaſſing, &c. muſt be during the marriage with the king, for after the king's death ſhe is not *ſa compaigne*, and therefore it extendeth not to a queene dowager, and for this cauſe this word *compaigne* was uſed in this act.

Britton *ubi ſupra.*

(10) *Le fitz eigne et heire le roy.*] The eldeſt ſonne and heire of a queen regnant is within this law. Before this ſtatute ſome did hold, that to compaſſe the death of any of the king's children, was treaſon. But by this act it is reſtrained to the prince, the king's ſonne, being heire apparant to the crowne for the time being: and he need not be the firſt begotten ſonne, for the ſecond after the deceaſe of the firſt begotten without iſſue, is *fitz eigne* within this ſtatute, *et ſic de cæteris.* If the heire apparant to the crowne be a collateral heire apparant, he is not within this ſtatute, untill it be declared by parliament, as it was in the duke of York's caſe.

[9]

Roger Mortimer, earle of March, was in *anno domini* 1487 (11 R. 2.) proclaimed heire apparant. *Anno* 39 H. 6. Richard duke of York was likewiſe proclaimed heire apparant. And ſo was John de la Poole earle of Lincolne, by R. 3. And Henry marquiſſe of Exeter, by king Henry the eighth. But none of theſe or of the like, are within the purvieu of this ſtatute. And now that we have handled compaſſings and imaginations, let us proceed to the reſidue which concerne acts and deeds.

Heire is here taken for heire apparant, for he cannot be heire in the life of the father.

Mirror, ca. 1. §. 5. Brit. c. 23. fo. 43. a.

(11) *Si home violaſt la compaigne le roy.*] The Mirror ſaith, *Crime de majeſtie vers le roy p. ceux avowterors q. ſpergiſſent la feme le roy.* Whereby it appeareth that this was high treaſon by the common law.

33 H. 8. cap. 21.

Violare is here taken for *carnaliter cognoſcere*; and it is no treaſon, unleſſe it be done during the marriage with the king, and extendeth not to a queen dowager, as hath been ſaid. And if the wife

of

of the king doth yeeld and conſent to him that committeth this treaſon, it is treaſon in her.

(12) *Ou la compaigne de lour fitz et heire.*] This alſo extendeth to the wife of the prince during the coverture betweene them, and not to a dowager, and if the wife yeeld and conſent to him that commits this treaſon, it is treaſon in her.

Heire] Here is taken *ut ſupra*, for heire apparant.

(13) *Ou leigne file nient marie.*] (That is,) eldeſt daughter not married at the time of the violation, albeit there had been an elder daughter then ſhe, who is dead without iſſue. * The Mirror. *Avowterors q. ſpergiſſent la file le roy eignes legittime, avant ceo q. el ſoit marie.*

And the reaſon that the eldeſt only is here mentioned, is, for that for default of iſſue male, ſhe only is inheritable to the crowne.

(14) *Ou ſi home leva guerre enconter noſtre ſeignior le roy.*] [a] This was high treaſon by the common law, for no ſubject can levie warre within the realme without authority from the king, for to him it only belongeth, See F. N. B. 113. a. *Le roy de droit doit ſaver et defender ſon realme vers enemies, &c.*

[b] A compaſſing or conſpiracy to levie war, is no treaſon, for there muſt be a levying of war *in facto*. But if many conſpire to levie war, and ſome of them do levie the ſame according to the conſpiracy, this is high treaſon in all, for in treaſon all be principals, and war is levied.

If any levie war to expulſe ſtrangers, to deliver men out of priſons, to remove counſellors, or againſt any ſtatute, or to any other end, pretending reformation of their own heads, without warrant; this is levying of war againſt the king: becauſe they take upon them royall authority, which is againſt the king. There is a diverſity betweene levying of war and committing of a great riot, a rout, or an unlawfull aſſembly. [c] For example, as if three, or foure, or more, doe riſe to burne, or put down an incloſure in Dale, which the lord of the manor of Dale hath made there in that particular place; this or the like is a riot, a rout, or an unlawfull aſſembly, and no treaſon. But if they had riſen of purpoſe to alter religion eſtabliſhed within the realme, or laws, or to go from town to town generally, and to caſt downe incloſures, this is a levying of war (though there be no great number of the conſpirators) within the purview of this ſtatute, becauſe the pretence is publick and generall, and not private in particular. And ſo it was reſolved in the caſe of Richard Bradſhaw, miller, Robert Burton, maſon, and others of Oxfordſhire, whoſe caſe was, that they conſpired and agreed to aſſemble themſelves with ſo many as they could procure at Enſlowe-hill in the ſaid county, and there to riſe, and from thence to go from gentlemans houſe to gentlemans houſe, and to caſt downe incloſures, as well for inlargement of high-wayes as of errable lands. And they agreed to get armour and artillery at the lord Norrys his houſe, and to weare them in going from gentlemans houſe to gentlemans houſe for the purpoſe aforeſaid, and to that purpoſe they perſwaded divers others: and all this was confeſſed by the offenders. And it was reſolved, that this was a compaſſing and intention to levie war againſt the queen, becauſe the pretence was publick within the ſtatute of 13 Eliz. cap.

Paſch. 28 H. 8. in Spilman's Reports in caſe of Queen Anne. 33 H. 8. ubi ſupra, in caſe of Queen Katherine.

* Mirror, ca. 1. § 5. See Brit. cap. 23. fo. 43, 44. and cap. 29. fol. 71. 1 Mar. Parl. 2. c. 1.

a Glanvil, lib. 1. cap. 2. l. 14. c. 1. Bracton, lib. 3. fol. 118. Britton, f. 16, &c. Fleta, li. 1. ca. 21. Mir. ca. 1. § 5.

b 1 Mar. 98. b. Dier. in Sir N. Throgmorton's caſe. See 21 E. 3. 23. 21 R. 2. cap. Repeale, 1 H. 4. cap. 3. 8 E. 3. 20. See hereafter, cap. 73. againſt going or riding armed.

c See Rot. Parl. in Cro. Epiphan. 20 E. 1. Rot. 23. Humfrey de Bohun's caſe. 4 Eliz. 210. b. Dier. See the ſtatute of 1 Mar. ca. 2. By which, grand riots in ſome caſes be made felony.

[10]

Paſch. 39 Eliz. by all the judges of England, I being attourney-generall, and preſent.

cap. 1. (the letter whereof herein ſhortly followeth,) and the offenders were attainted and executed at Enſlowe-hill.

And this diverſity is proved by a latter branch of this act.

Et ſi per caſe aſcun home de ceſt realme chimancha arme diſcovert ſecretment ove gents armes, contre aſcun autre, pur luy tuer, ou diſrober, ou pur luy prender, ou retayner tanq. il face fine, ou ranſome pur ſa deliverance, neſt lentention le roy et de ſon counſell, q. en tiel caſe ſoit adjudge treaſon, mes ſoit adjudge felony, ou treſpaſſe, ſolonq. le ley del tre. auncient-ment uſe. Whereby it appeareth, that bearing of armes in warlike manner, for a private revenge or end, is no levying of war againſt the king within this ſtatute. So that every gathering of force is not high treaſon. And ſo it was reſolved in parliament, in 5 H. 4 rot. parliam. nu 11. & 12. the earle of Northumberland's caſe.

Rot. Parl. 5 H. 4. nu. 11, 12.

By the ſaid ſtatute of 13 Eliz. cap. 1. it is enacted, declared, and eſtabliſhed, that during the naturall life of queene Elizabeth, if any within the realme or without, ſhould compaſſe, imagine, invent, deviſe, or intend to levie war againſt her majeſty, within this realme, or without, and the ſame declare by writing, or word, &c. that it ſhould be high treaſon: ſo during the life of the queen, a conſpiracy to levie war was high treaſon, though no war were levied; and upon that law, Bradſhaw, Burton, and others, were attainted of high treaſon, for conſpiracy only to levie war. But it was reſolved by all the juſtices, that it was no treaſon within the ſtatute of 25 E. 3. as hath been ſaid. The words in this law are [*levie guerre*] an actuall rebellion or inſurrection is a levying of war within this act, and by the name of levying war is to be expreſſed in the indictment. If any with ſtrength and weapons invaſive, and defenſive, doth hold and defend a caſtle or fort againſt the king and his power, this is levying of war againſt the king within this ſtatute of 25 E. 3.

13 Eliz. cap. 1. b. The indictments and attainders of treaſon by force of this ſtatute are not more to be followed, becauſe the ſtatute which made them good, is expired. Dier, 3 & 4 Ph. and Mar. 144. 10 E. 4. 6. 1 Mar. Treaſon, Br. 24. Ter. Mic. 8 H. 8. Mich. 7 H. 5. Coram rege. Heref. Rot. 20.

It was reſolved by all the judges of England in the reigne of king H. 8. that an inſurrection againſt the ſtatute of labourers, for the inhanſing of ſalaries and wages, was a levying of war againſt the king, becauſe it was generally againſt the kings law, and the offenders took upon them the reformation thereof, which ſubjects by gathering of power ought not to do. It was ſpecially found, that divers of the kings ſubjects did miniſter and yeeld victuals to Sir John Oldcaſtle, knight, and others, being in open war againſt the king, and that they were in company with them in open war; but all this was found to be *pro timore mortis, et quod recceſſerunt, quam cito potuerunt:* and it was adjudged to be no treaſon, becauſe it was for feare of death. *Et actus non facit reum, niſi mens ſit rea.* And therefore this in them was no levying of war againſt the king within this act.

* Rot. Parl. 20 E. 1. nu. 2. John de Britaine's caſe. Rot. Parl. 33 E. 1. Rot. 6. Reb. de Res de Werke's caſe. 8 E. 3. 20. 38 E. 3. 31. a. Parl. 4 R. 2. nu. 17, 18, &c. 5 R. 2. Trialt 54. Hil. 18 E. 3. coram rege. Rot. 145. Eborum, 43. Aſſ. 28. 42. Aſſ. 29. Gilbert de M. was a Scot. Rot. Parl. 7 R. 2. nu. 15. 17. 24. 7 H. 4. 47. Cuſt. de Norm. ca. 73.

(15) *Ou ſoit adherent as enemies noſtre ſeignour le roy, a eux donant aide et comfort en ſon roialme et ayors.*]

Adherent.] [b] This is here explained, viz. in giving aide and comfort to the king's enemies within the realme or without: delivery or ſurrender of the king's caſtles or forts by the kings captaine thereof to the kings enemie within the realme or without for reward, &c. is an adhering to the kings enemy, and conſequently treaſon declared by this act. [b] A. is out of * the realme at the time of a rebellion within England, and one of the rebels flye out of the

[b] *Vid* 13 Eliz. Dier. 298.

the realme, whom A. knowing his treaſon doth aide or ſuccour, this is no treaſon in A. by this branch of 25 E. 3. becauſe the traytor is no enemy, as hereafter ſhall be ſaid; and this ſtatute is taken ſtrictly.

See hereafter, 35 H. 8. cap. 2.

As enemies.] *Inimicus* in legall underſtanding is *hoſtis*, for [c] the ſubjects of the king, though they be in open war or rebellion againſt the king, yet are they not the king's enemies, but traytors; for enemies be thoſe that be out of the allegiance of the king. If a ſubject joine with a foraine enemy, and come into England with him, he ſhall not be taken priſoner here and ranſomed, or proceeded with as an enemy ſhall, but he ſhall be taken as a traytor to the king.

[c] 43 Aſſ. 28, 29. 33 H. 6. 1. 19 E. 4. 6. a. and b. 4 Mar. Treaſon. Br. 32. 1 Mar. ibid. 24. 21 E. 3. 23. 22 Aſſ. p. 49. 13 El. Dyer, 298. Ex libro de Griffin de Perkin Werbeck.

[d] An enemy coming in open hoſtility into England, and taken, ſhall be either executed by marſhall-law, or ranſomed; for he cannot be indicted of treaſon, for that he never was within the protection or ligeance of the king, and the indictment of treaſon ſaith, *contra ligeantiam ſuam debitam.*

[d] Dier, 4. Mar. fo. 145. a. Lib. 7. fo. 6. b. Calvin's caſe.

[e] David prince of Wales levied war againſt E. 1. this was treaſon, for that he was within the homage and ligeance of the king, and had judgement given againſt him as a traytor, and not as an enemy. And albeit in many preſidents of indictments, ſubjects that be rebels, and traytors, &c. be called *proditores et inimici*; yet within this ſtatute they are not *inimici*.

[e] Fleta, lib. 1. c. 16.

[f] In the duke of Norfolk's caſe the queſtion was, a league being between the queene of England and the king of Scots, whether the lord Heriſe and other Scots *in aperto prælio* burning and waſting divers townes in England without the aſſent of the king, were enemies in law within this ſtatute, and reſolved that they were. [g] See more hereafter in this third part of the Inſtitutes. cap. 49. of Piracy, &c. upon the ſtatute of 28 H. 8. cap. 15.

[f] Mich. 13. & 14. Eliz. per Juſtice. 19 E. 4. 6. b. 18 H. 6. ca. 4. 20 H. 6. cap. 1.

[g] 27 E. 3. cap. 13. 31 H. 6. cap. 4. 7 E. 4. 14. 13 E. 4. 9. 21 E. 3. 16, 17. Regiſt. 129. Fit. N. B. 114.

Ou per ailors.] That is to ſay, out of the realme of England. But then it may be demanded, how ſhould at this time this forraigne treaſon be tried? And ſome [h] of our books doe anſwer, that the offender ſhall be indicted and tried in this realme where his land lyeth, and ſo it was adjudged in 2 H. 4. But now by the ſtatute of 35 H. 8. cap. 2. (which yet remains in force) all offences made or declared, or hereafter made or declared treaſons, miſpriſions of treaſon, and concealements of treaſon, committed out of the realme of England, ſhall be inquired of, heard, and determined, either in the king's bench or before commiſſioners in ſuch ſhire as ſhall be aſſigned by the king. If it be before commiſſioners, it hath been commonly uſed, that the king doth write his name in the upper part of the commiſſion. But in the caſe of Patrick o'Cullen an Iriſhman, the queene did put her ſignature to the warrant to the lord keeper, and not to the commiſſion: * and it was holden by the juſtices that the one way and the other was a ſufficient aſſignement by the king within the ſtatute of 35 H. 8.

[h] 4 Aſſ. p. 15. 5 R. 2. *ubi ſupra.* 19 E. 4. 6. b. Dier. 3. Mar. 132. Paſch. 2 H. 4. *coram rege.* Rot. 8. Wallia. 35 H. 8. cap. 2. 3 Mar. *ubi ſupra.* 13 Eliz. Dier. 298. Stanford Pl. Cor. fo. 90. a. and b. See the firſt part of the Inſtitutes, 440.

* Hil. 36 Eliz. in the caſe of Patrick o'Cullen, for a treaſon at Bruſſels *in partibus marinis.*

[i] It was reſolved by all the judges of England, that for a treaſon done in Ireland the offender may be tryed by the ſtatute of 35 H. 8. in England, becauſe the words of the ſtatute be, all treaſons committed out of the realme of England, and Ireland is out of the realme of England. And ſo it was reſolved in Sir John Parrot's caſe. And our word here [*per ailors*] is as much as out of the realme

[i] 33 El. in Ornick's caſe. lib. 7. f. 23. Calvin's caſe. *Vid.* Dier. Mich. 19 & 20 Eliz. fo. 360. lib. 11. fo. 63. in Doct. Foſter's caſe.

realme of England. See Paſch. 2 H. 4. *coram rege rot.* 8. Salop: Treaſon in Wales.

[k] All treaſons done upon the ſea ſhall be inquired, heard, and determined in ſuch ſhires and places of the realme as ſhall be limited by the king's commiſſion, in like forme and condition, as if the ſame had been done upon the land, &c. after the common courſe of the lawes of this land. And by the preamble it appeareth, that it could not be tryed by the common law, but by the civill law before the lord admirall. See hereafter in the expoſition of the ſtatute of 28 H. 8. cap. 15. *et infra*, cap. 49.

[k] 28 H. 8. ca. 15. This act concerning treaſons is not taken away by the ſtatute of 35 H. 8. cap. 2. *Vide infra* cap. 49. fo. 181. of Piracy, &c. Vid. 5 Eliz. c. 5.

[12]

(16) *Et de ceo provablement ſoit attaint per overt fait per gents de lour condition.*] In this branch four things are to be obſerved, [g] firſt this word [*provablement*] provably, that is, upon direct and manifeſt proof, not upon conjecturall preſumptions, or inferences, or ſtraines of wit; but upon good and ſufficient proofe. And herein the adverb [*provablement*] provably, hath a great force, and ſignifieth a direct and plain proof, which word the king, the lords, and commons in parliament did uſe, for that the offence was ſo hainous, and was ſo heavily, and ſeverely puniſhed, as none other the like, and therefore the offender muſt provably be attainted, which words are as forcible, as upon direct and manifeſt proof. Note, the word is not (probably) for then *commune argumentum* might have ſerved, but the word is [*provably*,] be attainted.

[g] See 1 E. 6. ca. 12. the laſt clauſe. 5 E. 6. ca. 11. 1 & 2 Ph. & Mar. ca. 10. and 11. 1 Eliz. cap. 6. 13 Eliz. cap. 1. Stanf. pl. Cor. 89. and 164. Br. coron. 4 Mar. 220. Dier. 2 Mar. fo. 99.

2. This word *(attaint)* neceſſarily implyeth that he be proceeded with, and attainted according to the due courſe, and proceedings of law, and not by abſolute power, or by other meanes, * as in former times had been uſed. [h] And therefore if a man doth adhere to the enemies of the king, or be ſlaine in open warre againſt the king, or otherwiſe die before the attainder of treaſon, he forfeiteth nothing, becauſe (as this act ſaith) he is not attainted: wherein this act hath altered that, which before this act, in caſe of treaſon, was taken for law. And the ſtatute of 34 E. 3. cap. 12. ſaves nothing to the king, but that which was in *eſſe*, and pertaining to the king at the making of that act. And this appeareth by a judgement in parliament in *anno* 29 H. 6. cap. 1. that * Jack Cade being ſlaine in open rebellion could no way be puniſhed, or forfeit any thing, and therefore was attainted by that act of high treaſon.

* Rot. parl. an. 33 E. 1. Rot. 6. Jo. Salvyn's caſe.

[h] 43. Aſſ. 28. 8 E. 3. 20. 7 H. 4. 27. 34 E. 3. cap. 12. Lib. 4. fo. 57. the Sadler's caſe.

*29 H. 6. cap. 1.

3. *Per overt fait*,] *per apertum factum*. This doth alſo ſtrengthen the former expoſition of the word *(provablement,)* that it muſt be provably, by an open act, which muſt be manifeſtly proved. As if divers doe conſpire the death of the king, and the manner how, and thereupon provide weapons, powder, * poiſon, aſſay harneſs, ſend letters, &c. or the like, for execution of the conſpiracy. Alſo preparation by ſome overt act, to depoſe the king, or take the king by force, and ſtrong hand, and to impriſon him untill he hath yeelded to certaine demands, this is a ſufficient overt act to prove the compaſſing, and imagination of the death of the king: for this upon the matter is to make the king a ſubject, and to diſpoyle him of his kingly office of royall government. And ſo it was reſolved by all the judges of England. Hill. 1 Jac. *regis*, in the caſe of the lo. Cobham, lord Gray, and Watſon and Clarke ſeminary prieſts: and ſo had it been reſolved by the juſtices, Hill. 43. Eliz. in the caſe of the earles of E. and of S. who intended to goe to the court

Vide ſupra verbo ¶ Mort. fo. 6. Vide 21 R. 2. cap. 3. but it is repealed by 1 H. 4. ca. 3.

* Hill, 36 Eliz. Doctor Lopes caſe, 13 Eliz. c. 1. Brooke, Treaſon, 24.

Hill. 1 Ja. R. Lo. Cobham's caſe.

court where the queen was, and to have taken her into their power, and to have removed divers of her counſell, and for that end did aſſemble a multitude of people; this being raiſed to the end aforeſaid was a ſufficient overt act for compaſſing the death of the queen. And ſo by woful experience in former times it hath fallen out, in the caſes of king E. 2. R. 2. H. 6. and E. 5. that were taken, and impriſoned by their ſubjects. And this is made more plain by the legall forme of an inditement of treaſon: for firſt it is alledged according to this act, *quod* * *proditorie compaſſavit, et imaginatus fuit mortem et deſtructionem dni. regis, et ipſum dom. regem interficere, &c.* in the ſecond part of the inditement is alledged the overt act, *et ad illam nephandam, et proditoriam compaſſationem, imaginationem, et propoſitum ſuum perficiend' et perimplend'* and then certainly to ſet downe the overt fact for preparation to take, and impriſon the king, or any other ſufficient overt act, which of neceſſity muſt be ſet downe in the inditement. Hereby it appeareth how inſufficient many inditements were of high treaſon, wherein it was generally alledged, that *per apertum factum compaſſavit et imaginatus fuit mortem dom. regis, &c.* * For example *termo. Mic. anno* 5 E. 6. Edward duke of Somerſet was indited before commiſſioners of over and terminer in London, *quod ipſe deum præ oculis ſuis non habens, ſed inſtigatione diabolica* ‡ *ſeductus, apud Holborne in parochia Sancti Andreæ infra civitatem London, viz. 20 die Aprilis anno regni domini regis Edw. ſexti quinto, et diverſis diebus et vicibus antea et poſtea falſe, malicioſe, et proditorie* * *per apertum factum circumivit, compaſſavit, et imaginavit cum diverſis aliis perſonis prædictum dominū regem de ſtatu ſuo regali deponere et deprivare, &c.* Which indictment, and all others of like forme were againſt law, as hath been ſaid, and of the matter of this indictment that noble duke was by his peers found not guilty. But then it may be demanded, for what offence he had judgement of death, and 2. what law made it an offence. The offence appeareth in his indictment, for the former part thereof contained high treaſon, whereof he was acquitted, and the latter part contained one only offence of felony (whereof he was found guilty) in theſe words, *et ulterius juratores præd. præſentant, quod præfatus Edwardus dux Somerſet dcū præ oculis ſuis non habens, ſed inſtigatione diabolica ſeductus 20 Maii an. regni dicti dom. regis Edwardi ſexti quinto ſupradicto, ac diverſis aliis diebus et vicibus antea et poſtea apud Holborn in præd. paroch. Sancti Andreæ in civitate London, et apud diverſa alia loca infra civitatem London præd. felonice ut felo dicti dom. regis per aperta verba et facta procuravit, movit, et inſtigavit complurimos ſubditos ipſius domini regis ad inſurgendum, et apertum rebellionem et inſurrectionem infra hoc regnum Angliæ movend' contra ipſum dominum regem, et ad tunc et ibid. felonice ad capiendum et impriſonandum prænobilem Johannem comitem Warwick de privato conſilio domini regis ad tunc exiſten', contra pacem dicti domini regis coronam et dignitatem ſuam, et contra formam ſtatuti in hujuſmodi caſu editi et proviſi.* The ſtatute whereupon this indictment was intended to be grounded, was the branch of the ſtatute of 3 and 4 E. 6. by which it is provided, " That if any perſon or perſons by ringing of any bel, &c. or by malicious ſpeaking or uttering of any words, or making any outcry, &c. or by any other deed or act ſhall raiſe or cauſe to be raiſed or aſſembled any perſons to the number of 12 or above, to the intent that the ſame perſons ſhould

* In ancient time *traditioſè, et felonicè.* parl. 33 E. 1. rot. 6. Robert de Ros his caſe, but now *proditorie* is neceſſarily required. Vide Britton, fo. 16. et 19. 1 Mar. Br. treaſon. 24. * Ter. Mic. 5 E. 6. Lib. Intr. Coke, fo. 482. *Sanguinis O maledicta ſitis, &c.*

‡ [13]

* Per apertum factum.

Vid. hereafter ca. 5. de Hereſie, generall indictments againſt Lolards, &c.

The reſidue of the indictment of the duke of Somerſet.

To take and impriſon one of the privie councell. Contra formam ſtatut. 3 & 4 E. 6. cap. 5.

ſhould do, commit, or put in ure any of the acts and things above mentioned (whereof to take and impriſon any of the kings moſt honourable privie counſell was one) and the perſons to the number of 12 or above ſo raiſed and aſſembled after requeſt and commandement (in ſuch ſort as in that act is preſcribed) ſhall make their abode and continue together, as is aforeſaid, (in the act) or unlawfully perpetrate, doe, commit, or put in ure any of the acts or things aboveſaid, that then all and ſingular perſons by whoſe ſpeaking, deed, act, or any other the meanes above ſpecified any perſons to the number of 12 or above, ſhall be raiſed or aſſembled for the doing, committing, or putting in ure any of the acts or things above mentioned, ſhall be adjudged for his ſo ſpeaking or doing a felon, and ſuffer execution of death as in caſe of felony, and ſhall loſe his benefit of ſanctuary and clergy." Hereby it doth manifeſtly appeare, that the truth concerning this nobleman's attainder, and execution in divers things, is contrary to the vulgar opinion, and ſome of our chronicles, and in ſome points contrary to law. Firſt, that for the felony made by the ſaid branch of the ſaid act he could not have had his clergie, for clergy in that caſe is expreſly ouſted by the ſaid act. 2. That he was not indicted for going about, &c. the death of the earle of Warwick then of the kings privie counſell, but only for his taking or impriſonment, and therefore could not be indicted upon the ſtatute of 3 H. 7. as ſome have imagined. 3. That the indictment is altogether inſufficient, for it purſueth not the words or matter of the ſaid branch of the ſaid act, as by comparing of them it manifeſtly appeareth; which (we being deſirous that truth may appeare in all things) we have thought good upon this occaſion to adde for advancement of truth. 4. That being but attainted of felony, he could not by law be beheaded, as elſewhere we have ſhewed. And this act that created the felony ſaith, that ſuch a felon ſhall ſuffer execution of death, as in caſe of felony. 5. Laſtly, this whole act was juſtly holden to be a doubtful and dangerous ſtatute, and therefore was deſervedly repealed. And after the fall of this duke, ſee the preamble of the ſtatute of ſubſidie of 7 E. 6.

3 H. 7. ca. 14.

Lib. 9. fo. 114. in ſeignior Sancher's caſe.

1 Mar. cap. 12.
1 Eliz. ca. 16.
7 E. 6. ca. 12.

[14]

And now to returne to caſes of high treaſon. If a man be arraigned upon an indictment of high treaſon, and ſtand mute, he ſhall have ſuch judgement, and incurre ſuch forfeiture, as if he had been convicted by verdict, or if he had confeſſed it. For this ſtandeth well with this word *provablement*, for *fatetur facinus, qui judicium fugit:* but otherwiſe it is in caſe of petit treaſon, murder, or other felony.

13 Eliz. Dier, 298.
13 Eliz. cap. 1.
Nota bene. Vide ſupra verbo Mort.

If a ſubject conſpire with a foraine prince beyond the ſeas to invade the realme by open hoſtility, and prepare for the ſame by ſome overt act, this is a ſufficient overt act for the death of the king, for by this act of parliament in that caſe there muſt be an overt act. * *Qui capiti, aut ſaluti regis perfidioſe ſive ſolus, ſive ſervis aut ſicariis mercede conductis ſtipatus inſidiabitur, vita et fortunis ejus omnibus privator.* So as thereby an overt act was required.

* Inter leges Alveredi, cap. 4.

The compoſition and connexion of the words are to be obſerved, viz. [thereof be attainted by overt deed.] † This relateth to the ſeverall and diſtinct treaſons before expreſſed), and ſpecially to the compaſſing and imagination of the death of the king, &c. for that it is ſecret in the heart) and therefore one of them cannot

† So reſolved by the juſtices Paſc. 35 Eliz. which we heard and obſerved.

be an overt act for another. As for example: a conſpiracy is had to levie warre, this (as hath been ſaid and ſo reſolved) is no treaſon by this act untill it be levied, therefore it is no overt act or manifeſt proofe of the compaſſing of the death of the king within this act: for the words be *(de ceo, &c.)* that is, of the compaſſing of the death. For this were to confound the ſeverall claſſes, or *membra dividentia, et ſic de cæteris, &c.*

[a] Divers latter acts of parliament have ordained, that compaſſing by bare words or ſayings ſhould be high treaſon; but all they are either repealed or expired. And it is commonly ſaid, that bare words may make an heretick, but not a traytor without an overt act. And the wiſdome of the makers of this law would not make words only to be treaſon, ſeeing ſuch variety amongſt the witneſſes are about the ſame, as few of them agree together. But if the ſame be ſet downe in writing by the delinquent himſelfe, this is a ſufficient overt act within this ſtatute.

[b] Cardinall Poole, albeit he was a ſubject to H. 8. and of the kings blood, (being deſcended from George duke of Clarence, brother to king E. 4.) yet he in his booke of the ſupremacy of the pope, written about 27 H. 8. incited Charles the emperour, then preparing againſt the Turke, to bend his force againſt his naturall ſoveraigne lord and countrey; the writing of which booke was a ſufficient overt act within this ſtatute: and to move the emperour the rather in that book, he made H. 8. almoſt as ill as the Turk, in theſe words, *in Anglia ſparſum nunc eſt hoc ſemen, ut vix à Turcico internoſci queat, idque authoritate unius coaluit.*

[c] In the preamble of the ſtatute of 1 Mar. concerning the repeale of certaine treaſons, &c. It is agreed by the whole parliament, that lawes juſtly made for the preſervation of the common-wealth without extreame puniſhment, are more often obeyed and kept, then lawes and ſtatutes made with great and extreame puniſhments: and in ſpeciall, ſuch lawes and ſtatutes ſo made: whereby not only the ignorant and rude unlearned people, but alſo learned and expert people minding honeſty, are oftentimes trapped and ſnared, yea, many times * for words only, without other fact or deed done or perpetrated: therefore this act of 25 E. 3. doth provide, that there muſt be an overt deed. But words without an overt deed [d] are to be puniſhed in another degree, as an high miſpriſion.

Pet gents de lour condition.] That is, *per pares*, or their equals, whereof we have ſpoken before in the expoſition of the [e] 29 chapter of Magna Carta. verb. *per judicium parium ſuorum*, and more ſhall be ſaid hereafter. This branch *(per gents de lour condition)* extendeth only to a conviction by verdict, whereof the ſtatute particularly ſpeaketh; but yet where the party indicted confeſſeth the offence or ſtandeth mute, he ſhall have judgement as in caſe of high treaſon. For this branch being affirmative, is taken *cumulative* and not *privative*. And therefore ſeeing upon confeſſion, or ſtanding mute, the judgment in caſe of high treaſon was given at the common law, this act being, as it hath been ſaid, affirmative, taketh not away the ſame: and (to ſay once for al) the clauſe hereafter of reſtraint of like caſes, &c. extends onely to offences, and not to tryals, judgements, or executions.

[a] 26 H. 8. cap. 13. 1 E. 6. cap. 13. 1 & 2 Ph. and Mar. cap. 9, 10. 1 Eliz. cap. 6. 13 Eliz. ca. 1, &c. 14 Eliz. cap. 1.

[b] See the fourth part of the Inſtitutes, ca. 26. Brook, treaſon 24 writing of letters.

[c] 1 Mar. ceſſ. 1. c. 1. See the ſtatute of 3 H. 7. hereafter, cap. 4. directly in the point by the judgement of the parliament. *Nota*, this act of 25 E. 3. ſaith, *per overt fait, per * apertum factum*, and not *per apertum dictum*, by word or confeſſion. See 25 H. 8. c. 12. Eliz. Barton, Edw. Locking, and others attainted by parliament for divers words and conſpiracies which being not within this act without an overt act they could not be attainted by the common law.

* Nota.

[d] See in the chapter of Miſpriſion.

[15]

[e] Mag. Car. ca. 29.

Bract. l. 3. fo. 118. Brit. fo. 10, &c. Bract. l. 5. fo. 414. Fleta, l. 1. ca. 21. Mirror, ca. 1. § 6. de fauſonerie. 29 Aſſ pa. 49. * 1 E. 3. tit. Chre. F. 13. 22 Aſſ. Pl. 49.

(17) *Si home counterface le grand ſeale.*] All our ancient authors agree that this was high treaſon by the common law, and for this offence his judgement was to be drawn, hanged, and quartered, at the common law, as in other caſes of high treaſon, (the counterfeiting of the kings mony excepted.) See the ſecond part of the Inſtitutes. W. 1. cap. 5.

*In ancient time every treaſon was comprehended under the name of felony, but not *è contra:* and therefore a pardon of all felonies was ſometime allowed in caſe of high treaſon. But the law is, and of long time hath been otherwiſe holden: and if the inditement were *felonicè*, and not *proditoriè*, (for the king may leſſen the offence, if it pleaſe him) then the pardon of felonies is good at this day, for no inditement can be of high treaſon without this word *(proditoriè:)* and *in qualibet proditione implicatur felonia, quia in qualibet brevi de exigendo ſuper quolibet indictamento de proditione proclamator facit ſic*, I. B. an exigent on thy head of treaſon and felony.

2 R. 3. 9.

3 H. 7. 10. a.

A compaſſing, intent, or going about to counterfeit the great ſeale is no treaſon, but there muſt be an actuall counterfeiting, alſo it muſt be to the likeneſſe of the kings great ſeale, the words be, *counterface le grand ſeale le roy.*

Now it is to be ſeen what ſhall be ſaid a forging, or counterfeiting of the great ſeale. If the lord chancellor, or lord keeper put the great ſeale to a charter &c. without warrant, this is no treaſon, becauſe the great ſeale is not counterfeited. But it ſeemeth by Briton fo. 10. b. that it was treaſon at the common law, and of that opinion is Fleta fo. 29. a. but it is no treaſon now (without queſtion) by the negative clauſe of this act.

If a man take wax lawfully imprinted with the great ſeale from one patent, and fix it to a writing purporting a grant from the king, there have been divers opinions in this caſe what the offence is, which we will rehearſe.

40 Aſſ. p. 33.

In 40 Aſſ. which was about 15 years after the making of this act, it was not holden high treaſon, but a great miſpriſion, for that it is no counterfeiting of a new, but an abuſe of the true great ſeale.

Rot. Clauſ. 42 E. 3. nu. 8. in coro.

In 42 E. 3. the abbot of Bruer cauſed Rob. Rigge his commoigne to raſe a charter of R. 1. and put out the mannor of Fiſſetruda, and in place thereof put in Elleghe. And this offence was heard, and ſentenced before the king and his counſell in the ſtar-chamber, as a great offence and miſpriſion: for if it had been high treaſon, it ſhould have had another tryall, and yet this was a great abuſe of the great ſeal.

2 H. 4. fo. 25.

2 H. 4. The taking of the great ſeale from one patent and fixing it to a commiſſion to gather mony, &c. was adjudged to be ſuch an offence, as the offender had judgement to be drawne, and hanged. The record of which caſe we have peruſed, and the effect thereof is this. The partie is indited generally for counterfeiting of the great ſeal, whereunto he pleaded not guilty, and the jury found him not guilty of the counterfeitting of the great ſeale, as was ſuppoſed by the inditement, and found further ſpecially, that he tooke the great ſeale from one patent, and put it to the commiſſion, and that the party put the ſame in execution, and there judgement was given, that he ſhould be drawne and hanged: which (whatſoever the offence was) ought not to have been given upon this

Errores ad ſua principia referre, eſt refellere. To bring errors to their beginning, is to ſee their laſt.

this verdict, the Jury finding him not guilty of the offence alledged in the inditement: and besides the judgement is such, as is given in case of petit treason, and not of high treason. Hereby it appeareth how dangerous it is for any to report a case by the ear, specially concerning treason, unlesse he had advisedly read the record: for (as I take it) the misreport of this case hath hatched errors, and he mistooke the judgment, if it had been high treason, for then it should have been drawne, hanged, and quartered.

37 H. 8. Br. tit. Treason. A chaplain had fixed such a great seale to a patent of dispensation with non-residence, and this was holden a misprision, and not high treason, for it was an abuse of the great seale, and no counterfeiting of it. Stanford saith that it was adjudged in his time according to the book of 2 H. 4. *et sic ex errore sequitur error.*

37 H. 8. Br. Treason.

Stanf. Pl. Coron. fo. 3. c.

Bracton agreeth with it. *Ubi supra.*

Leak's case. Hil. 4 Ja. R.

G. Leak a clark of the chancery joyned two cleane parchments fit for letters patents so close together with mouth glew, as they were taken for one, the uppermost being very thinne, and did put one labell through them both, then upon the uttermost he writ a true patent, and got the great seale put to the labell, so the labell and the seale were annexed to both the parchments, the own written, and the other blanck: he cut off the glewed skirts round about, and tooke off the uppermost thinne parchment (which was written, and was a true and perfect patent) from the labell, which with the great seale did still hang to the parchment, then he wrote another patent on the blancke parchment, and did publish it as a good patent. Hereupon two questions were moved. 1. Whether this offence be high treason or no. 2. If it be high treason, then whether he may be indited generally for the counterfeiting of the great seale, or els the speciall fact must be expressed. And upon conference had between the judges, upon great advisement and consideration it was in the end, concerning the first point, resolved by the justices (saving a very few) upon the authorities aforesaid, and for that it was no counterfeiting of the great seale within this statute, that this offence was neither high treason, nor petit treason, because it is not within either of the branches of this statute, but it is a very great misprision, and the party delinquent liveth at this day. As to the 2. point it was resolved, that if the speciall matter had amounted to counterfeiting of the great seale in law within this act, then he might have been generally indited of high treason for counterfeiting the great seale. As if a man in an affray kill a constable that comes to keep the kings peace without any expresse malice prepensed, this is murder in law, and yet the delinquent may bee generally indited of murder by malice prepensed.

40 Ass. 33. 42 E. 3. Rot. Cl. *Ubi supra.* 37 H. 8. Br. dev.

And [a] Fleta who wrote before this act telleth us, that *crimen falsi dicitur, cū quis illicitus (cui non fuerit ad hoc data authoritas) de sigillo regis rapto vel invento, et brevia cartasque consignaverit.* But whatsoever offence it was before the making of this statute, it is after this statute no high treason, because it is no counterfeiture of the great seale, but a misusor thereof.

[a] Fleta, l. 1. ca. 22. Britton, fo. 10. b. See before, fo. 15.

Qui [b] *convictus fuerit pro falsatione sigilli dom. regis, quòd tradatur episcopo Sarum, qui cum petiit ut clericum suum sub pœna et in forma qua decet, quia videtur concilio quod in tali casu non admittenda est purgatio,* &c. Hereby it should appeare that in those dayes a man might have had his clergie for this offence, and therefore as some hold, it

[b] Rot. Parl. Hil. 18. E. 1. fo. 92. nu. 125.

was not then holden to be high treaſon, and herein alſo is the preamble of this act, concerning divers opinions in caſe of treaſon, verified.

This ſtatute naming the great ſeale and privie ſeale, the forging and the counterfeiting of the privie ſignet, or of the ſigne manuell was not within this ſtatute. But by the [e] ſtatute of 1 Mar. it is made high treaſon in both caſes. Albeit that in this act there is no mention made of * ayders and conſenters to this counterfeiting, yet they are within the purvieu of this ſtatute, for there be no acceſſaries in high treaſon.

(18) *Ou ſa* [d] *monye.*] [e] This was treaſon by the common law, as it appeareth by all the ſaid ancient authors, *ubi ſupra (verbo, ſi home counterface le grand ſeale)* and therefore the opinion in 3 H. 7. is holden for no law, that it was but felony before this act. [f] The forging of the kings coine, is high treaſon, without utterance of it, for by this act the counterfeiting is made high treaſon. See the ſecond part of the Inſtitutes. W. 1. cap. 15. [g] See Thom. Walſingham. *Hypodigme Neuſtrie. an. dom.* 1278. *judei pro tonſura monetæ in magna multitudine ubique per Angliam ſuſpenduntur, &c.*

[h] *Si ipſe qui facit monetam authoritate regis, &c. illam facit minus in pondere vel allaiata, viz. alcumino vel alio falſo metallo contra ordinationem, &c.* This is there holden to be high treaſon, and by that book taken for a counterfeiter of the kings money within the purvien of this ſtatute. [a] And herewith agreeth Britton, who ſaith, *des fauceres q. ount noſtre monye counterfet ou pluis de allaye miſe in noſtre monye, q. nuſter, ne ſerroit ſolonq. le forme et uſage de noſtre realme.*

[b] *Ordeine fuit q. nul roy de ceſt realme ne puit changer ſa money, ne impairer, ne amender, ne auter monye faire q. de ore et argent, ſans aſſent de touts les counties.* It was ordained, that no king of this realme might not change his money, nor impaire, nor amend the ſame, nor other money make then of gold or ſilver, without aſſent of parliament.

[c] Clipping, waſhing, and filing of the money of this realme, was no counterfeiting of it within this act. And therefore being a like caſe, it was declared by parliament in anno 3 H. 5. cap. 6. to be high treaſon: but that act being repealed by 1 *Mariæ* the ſtatute of 5 Eliz. cap. 11. hath [d] declared, that clipping, waſhing, rounding, or filing, for wicked lucre and gaine, &c. to be high treaſon. And by the ſtatute of [e] 18 Eliz. it is declared, that if any perſon for wicked lucre or gaines-ſake, ſhall by any art, wayes, or meanes whatſoever, impaire, diminiſh, falſifie, ſcale, or lighten the kings money, &c. it is high treaſon, for being a like caſe, it was to be declared by parliament.

Forging [f] or counterfeiting of foraine money, which is not currant within the realme, is miſpriſion of treaſon, and the offender ſhall forfeit, as for concealement of high treaſon.

Sa money] [g] This extendeth only to the kings money coyned within this realme; and therefore after this ſtatute, if a man had counterfeited the money of another kingdome, though it were currant within this realme, it was no treaſon, untill it was ſo declared

[e] 1 Mar. cap. 6. 1 & 2 Ph. and Mar. ca. 11.

* 19 H. 6. 47. 3 H. 7. 10. Stanf. Pl. Coron. 3. vide poſtea, cap. 64. *principall and acceſſ.* See Mich. 13 & 14 Eliz. Dier, 296. Conier's caſe.

[d] See Mat. Par. *anno* 34 H. 3. pag. 753. *de pecunia approbata et reprobata.* Et Walſingham, 28 E. 1. *anno Dom.* 1300. ſtat. 31 E. 1. *de weights et meaſures.* Raſt. 7.

[17]

[e] Vet. Magna Chart. ca. Itin. fo. 151. a. 22 Aſſ. p. 49. 3 H. 7. 10. 25 E. 3. 42. b. Coro. 130.

[f] 6 H. 7. 13. 1 R. 3. 1.

[g] Walſ. Hyp. Neuſtrie, pa. 69. 1278. 6 E. 1.

[h] 3 H. 7. 10. a. b.

[a] See inter leges Athelſtani, ca. 14. Canuti, cap 61. Britton, cap. 5. fo. 19. b. See the Mirror, ca. 1. § 6. De la mony falſifie acc' with 3 H. 7. and ca. 5. § 1. and Fleta, ca. 22. acc.

[b] Mirr. ca. 1. § 3. inter Artic. perviels royes ordeinus. Rot. Par. 17 E. 3. nu. 15. Vide hic poſtea, cap. 31. 45 E. 3. ca. 13. 9 H. 5. cap. 11. Stat. 1.

See the ſecond part of the Inſtitutes, ca. 20. Artic. ſuper Cart. and the expoſition upon the ſame.

[c] 3 H. 5. ca. 6. 1 E. 6. cap. 12. 5 Eliz. cap. 11. [d] *Nota*, for wicked lucre and gain. [e] 18 Eliz. cap. 1. [f] 14 Eliz. cap. 3. [g] See hereafter, cap. Principall and Acceſſory.

clared

clared by parliament [h] in an. 1 Mariæ, and in an. 1 & 2 Ph. and M. and the ſaid acts of 5 Eliz. & 18 El. do extend to forrain coyne currant within this realme. And it is holden, that at the making of this ſtatute of 25 E. 3. there was no money currant within this realme, but the kings own coyne. [i] See the ſtatute called *ſtatutum de moneta magnum, et ſtatutum de moneta parvum.* And it is to be knowne, that if any doe counterfeit the kings coyne contrary to this ſtatute of 25 E. 3. [k] he ſhall have the puniſhment of his body, but as in caſe of petit treaſon, that is, to be drawne and hanged till he be dead, but the forfeiture of his lands is as in other caſes of high treaſon, for this ſtatute is but a declaration of the common law, and the reaſon of his corporall puniſhment is, for that in this caſe he was only drawne and hanged at the common law, but a woman in that caſe was to be burnt.

[l] The abbot of Miſſenden in the county of Buckingham for counterfeiting and refection of the kings money, was adjudged to be drawne and hanged, and not quartered. The want of obſervation of the ſaid diſtinction hath made ſome to erre in their judgement. Nota. This act of 25 E. 3. maketh no expreſſion of the judgement, therefore ſuch judgement as was at the common law either in caſe of high treaſon or petit treaſon muſt be given.

But if one be attainted for diminiſhing of the kings mony upon any of the ſtatutes made in queen Maries time, or in the time of queen Elizabeth, becauſe it is high treaſon newly made, the offender ſhall have judgement as in caſe of high treaſon, which judgement you may ſee in the firſt. part of the Inſtitutes. Sect. 747.

[m] And when a woman commits high treaſon and is quick with childe, ſhe cannot upon her arraignment plead it, but ſhe muſt either pleade not guilty, or confeſſe it: and if upon her plea ſhe be found guilty, or confeſſe it, ſhe cannot alleage it in arreſt of judgement, but judgement ſhall be given againſt her: and if it be found by an inqueſt of matrons that ſhe is quick with childe, (for *privivient enfent* will not ſerve) it ſhall arreſt, and reſpite execution till ſhe be delivered, but ſhe ſhall have the benefit of that but once, though ſhe be againe quick with childe: ſo as this reſpite of execution for this cauſe is not to be granted, only in caſe of felony, whereof juſtice Stanford ſpeaketh, but in caſe of high treaſon, and petit treaſon alſo.

(19). *Si home port faux money en ceſt roialme, counterfeit au money dangliterre, et fachant le money eſtre faux, &c.*] By this branch ſix things are to be obſerved. Firſt, that the bringing in of counterfeit money, and not the counterfeiting is expreſſed in this word [*apport.*] Secondly, that it muſt be brought from a foraine nation, and not from Ireland, or other place belonging to, or being a member of the crowne of England, and ſo it hath been reſolved, ſo wary are judges to expound this ſtatute concerning treaſon, and that in moſt benigne ſenſe: for albeit Ireland be a diſtinct kingdome, and out of the realme of England to ſome purpoſes, as to protections and fines levied, &c. as hath been ſaid: yet to ſome intent it is accounted as a member of or belonging to the crowne of this realme. And therefore a writ of error is maintainable here in the kings bench of a judgement given in the kings bench in Ireland, ſo as the judges did conſtrue this ſtatute not to extend to falſe money brought out of Ireland, Thirdly, it muſt be to the ſimilitude of the

[h] 1 Mar. cap. 6. 1 & 2 Ph. and Mar. cap. 11.

[i] Vet. Mag. Carta, part 2. fol. 38, 39, 40.

[k] Fleta, lib. 1. c. 22. who wrote before this ſtatute, which is but a law declaratory, as it appeareth before. 23 Aſſ. p. 2. Dier, 6 Eliz. Term. Tr. MS. *pro tonſura monetæ trabe et pend.* Tr. 24 H. 8. in Juſtice Spilmans Reports accord.

[l] Mich. 31 E. 3. coram rege. Rot. 55. Buck. within ſix yeares after making of our ſtatute.

[m] 25 E. 3. 42. b. Cor. 130 23 Aſſ. p. 2. 22 Aſſ. p. 71. 22 E. 3. Cor. 253. 12 Aſſ. p. 11. 8 E. 2. Cor. 410.

[18]

Stanford, f. ult. b.

Vid. hereafter, cap. 30. Rot. Parl. 17 E. 3. nu. 15.

7 H. 7. 10.

Lib. 7. Calvin's caſe, *ubi ſupra.*

the money of England. Fourthly, that the bringer of it into this realme, muſt know it to be counterfeit. Fifthly, uttering of falſe money in England, though he know it to be falſe and counterfeit to the likeneſſe of the coyne of England, is no treaſon within this ſtatute, unleſſe he brought it from a foraine nation, for the words be, *ſi home apport faux money en ceſt realme.* But if money falſe or clipped be found in the hands of any that is ſuſpicious, he may be impriſoned untill he hath found his warrant, *per ſtatutum de moneta magn' vet. Mag. Cart.* ſo. 38. 2 *parte.* Laſtly, he muſt merchandize therewith, or make payment thereof, expreſſed in theſe words, *pur merchandizer, ou paiment faire in deceipt noſtre ſeignior le roy et ſon people.* See more, *de moneta regis*, and of the derivation thereof in the ſecond part of the Inſtitutes, *in artic' ſuper cartas*, cap. 20.

3 H. 7. 10.

Si home tuaſt chancelour, treſurer, ou juſtice noſtre ſeigniour le roy del un banke ou del auter, juſtice in eire, ou daſſiſes et touts auters juſtices aſſignes doier et terminer eſteant en lour place feaſant lour office.

In this caſe albeit one intend to kill any of theſe here named in their place, and doing their office, and thereupon ſtrike or wound any of them, this is no treaſon: for our ſtatute ſaith, *ſi home tuaſt chancelor, &c.* If a man kill the chancellour, &c. For if it be treaſon, death muſt enſue. And the reaſon wherefore it is treaſon in theſe caſes is, becauſe ſitting judicially in their places, (that is, in the kings courts) and doing their office in adminiſtration of juſtice, they repreſent the kings perſon, who by his oath is bound that the ſame be done. And this act extends only to the perſons here particularly named, and to no other: and therefore extendeth not to the court of the lord ſteward, or of the conſtable and marſhall, nor to the court of the admiralty, or any other, nor to any eccleſiaſticall court. Nay, it extends not to the high court of parliament, if any member of the lords houſe, or houſe of commons be ſlaine in his place, and doing his office, becauſe it is *caſus omiſſus*, and not mentioned in this act. But in all thoſe caſes it is wilfull murder, for the law implyeth malice.

[a] Rot. Parliam. 20 E. 1. nu. 2. John de Britain's caſe. 3 Reg. 21. 15. See *inter leges Alveredi*, cap. 4. *ubi ſupra. Vita et fortunis omnibus privator.* Cuſt. de Norm. ca. 14. 22 lib. Aſſ. pl. 49.

Et ſoit aſſavoire. q. in les caſes ſuiſnomes doit eē adjudge treaſon q. ſe extenda a noſtre ſeignior le roy et ſa royall majeſtie: et de tiel treaſon le forfeiture des eſcheates appertient a noſtre ſeignior le roy cibien des tres. et tenements tenus des auters, come de luy meſme.

[19]

(20) [a] *Des tres. et tenements tenus des auters come de luy meſme.*] This is an affirmance of the common law, and the reaſon thereof is, for that the offence is committed againſt the ſoveraigne lord the king, who is the light and the life of the common-wealth: and therefore the law doth give to the king in ſatisfaction of his offence, all the lands, &c. which the offender hath, and that no ſubject ſhould be partaker of any part of the forfeiture for this offence.

And where the words be, [lands and tenements holden, &c.] yet the forfeiture extends to * rents charges, rents ſeck, commons, corrodies, and other hereditaments which are not holden, for in caſe of high treaſon the tenure is not materiall.

* Brook, Eſch. 9. See hereafter. *Verbo. Et de tiel manner de treaſon, &c.* Otherwiſe it is in caſe of petit treaſon and felony

This clauſe hath 7. limitations. Firſt, this act extends not [b] to lands in tayle, (ſaving only for the life of tenant in tayle) but the forfeiture of eſcheats is to be underſtood of ſuch lands and tenements, as he might lawfully forfeit. And theſe generall words take not away the

[b] 7 H. 4. 27. See hereafter in the title of *Premunire. Verb.* (des tres, &c.) Vid. 26 H. 8. cap. 13.

the ſtatute of *donis conditional'* [c] but latter ſtatutes give the forfeiture of eſtates in tail. 2. Nor doth this act extend to uſes, but [*] latter ſtatutes doe name uſes. 3. [d] Nor to rights of actions, where the entrie is taken away, and ſo is the law cleerly holden at this day. 4. Nor to any conditions, but by a [e] latter ſtatute conditions, unleſſe they be inſeparably knit to the perſon, be given to the king. 5. Nor to rights of entry, where any was in the lands [f] by title before the treaſon committed, but ſuch a right of entry is ſince given by latter ſtatutes. 6. Nor to lands or tenements, or rights [g] *in auter droit*, as in the right of the church, nor to lands in the right of a wife, but only during the coverture, and it extendeth to land which the offender hath [h] for life, for the forfeiture of the profits during his life. 7. It extendeth not to [*] a founderſhip of an houſe of religion *in free almoign*, for that is annexed to the bloud of the founder. Here goods and chattels be not named, but the forfeiture of them is implyed in the judgement.

[i] *Nota* lector, the ſaid acts of 26 H. 8. 33 H. 8. 5. and 6 E. 6. doe yet remain in force, notwithſtanding the ſaid ſtatute of 1 Mar. as it hath been often adjudged and reſolved, and namely Mich. 21. Ja. in the exchequer chamber, in a writ of error, upon a judgement given in the exchequer, between Ratcliffe, and the lord Sheffeild, by all the judges of England, and is agreeable to common experience.

See more of high treaſon in the next chapter following, cap. 2. verbo. *Et pur ceo que pluſors auters caſes, &c.*

[c] 26 H. 8. ca. 13. in fine. 33 H. 8. ca. 20. 5 & 6 E. 6. cap. 11. lib. 7. fo. 12, 13.
[*] 23 H. 8. ca. 20. 5 E. 6. ca. 11.
[d] Lib. 3. fo. 210. 7 H. 4. 6, &c.
[e] 33 H. 8. c. 20. lib. 7. fo. 11. Engleſield's caſe.
[f] Engleſield's caſe. *Ubi ſupra.*
[g] 5 E. 6. *ubi ſupra*, 1 Mar. Dier, 123. Dier, 12 El. 289. Temps. H. 8. Br. Coron. 5.
[h] 1 Mar. Dier, 108.
[*] 24 E. 3. 33. 72. Corody, Br. 5. Temps. H. 8. Eſcheat, 239.
[i] 12 El. Dier, 289. Lib. 3. fo. 10. 35. Lib. 7. fo. 33. 34. lib. 8. 72. 166. lib. 9. fo. 140. Stanf. Pl. Corone, 187. a.

CAP. II.

OF PETIT TREASON.

ET oveſque ceo il y ad un auter manner de treaſon, ceſtaſſavoir, quant un ſervant tua ſon maiſter (1) *ou un feme tua ſon baron* (2), *ou quant home ſeculer ou de religion tua ſon prelate a que il doit foye et obedience* (3). *Et de tiel manner de treaſon la forfeiture des eſcheats appertenont a cheſcun ſeignior de ſon fee proper, &c.*

Britton, ca. 8. and cap. 22.

And moreover there is another manner of treaſon, that is to ſay, when a ſervant ſlayeth his maſter, or a wife her huſband, or when a man ſecular or religious ſlayeth his prelate to whom he oweth faith and obedience. And of ſuch treaſon the eſcheats ought to pertain to every lord of his own fee, &c.

[20]

It was called high or grand treaſon in reſpect of the royall majeſty againſt whom it is committed, and comparatively it is called petit treaſon (whereof now this ſtatute ſpeaketh) in reſpect it is

committed againſt ſubjects and inferiour perſons, whereof this act doth enumerate three kinds.

(1) *Quant un ſervant tua ſon maiſter.*] This was petit treaſon by the common law, for ſo it appeareth by the [a] book of 12 Aſſ. that a woman ſervant killed her miſtris, wherefore ſhe had judgement to be burnt, which is the judgement at this day of a woman for petit treaſon. And herewith agreeth 21 E. 3. where the reader muſt know, that in ſtead of *mere* in that caſe you muſt read maiſter.

[a] 12 Aſſ. p. 30. 21 E. 3. 17. F. coron. 447. Statham, t. c. cor. 21 E. 3. 22 Aſſ. p. 49.

[b] And upon this act, if the ſervant kill the wife of his maſter, it is petit treaſon, for he is ſervant both to the huſband and wife.

[b] 19 H. 6. 47. Pl. Com. 86. b. Dier, 3 Mar. 128. 7 El. 235.

[c] If the child commit parricide in killing of his father or mother (which the law-makers never imagined any childe would doe) this caſe is out of this ſtatute, unleſſe the childe ſerved the father or mother for wages, or meat, drink or apparell, for that it is none of theſe three kinds ſpecified in this law. And yet the offence is far more hainous and impious in a child then in a ſervant, for *peccata contra naturam ſunt graviſſima:* but the judges are reſtrained by this act, to interpret this act, *à ſimili*, or *à minore ad majus*, as hereafter ſhall be ſaid. And * ſome ſay that parricide was petit treaſon by the common law.

[c] Exodus, c. 21. v. 15. 17. Lev. 20. v. 9. 1 Mar. per Bromley and Portman of the report of Juſtice Daliſon. vid. 1 R. 3. 4. *In culeo paricidæ cum ſimia, cane, gallo, et ſerpente incluſi mari olim mergebantur: ſed nos non habemus talem conſuetudinem.*

[d] A ſervant of malice intended to kill his maſter, and lay in wait to doe it whileſt he was his ſervant, but did it not till a year after he was out of ſervice, and it was adjudged petit treaſon within this act.

* 22 E. 1. Math. Par. 874.

[d] 33 Aſſ. p. 7. Li. 1. f. 99. Shelly's caſe. 10 H. 6. 47. pl. com. 260.

(2) *Un feme tua ſin baron.*] [e] This was petit treaſon by the common law, as it appeareth in our books. If the wife procure one to murder her huſband, and he doth it accordingly, in this caſe the wife being abſent is but acceſſory, and ſhall be hanged and not burnt, becauſe the acceſſory cannot be guilty of petit treaſon, where the principall is not guilty but of murder: and the * acceſſory muſt follow the nature of the principall: but if he that did the murder had been a ſervant of the huſband, it had been treaſon in them both, and the wife ſhould have been burnt. And ſo it is in the caſe before of a ſervant, and in the caſe hereafter of a clerk.

[e] 15 E. 2. Coron. 383. 19 H. 6. 47. See c. Pr. & Acc' Dier, 34 H. 8. 50. Dier, 16 El. 332. Saunders' caſe. Paſch. 32 E. 3. Rot. 62. coram rege. Ph. Clifton's caſe.

If the wife and a ſtranger kill the huſband, it is petit treaſon in the wife, and murder in the ſtranger, and ſo it is in the caſe of the ſervant next before, and of the clerk next after.

* 40 Aſſ. p. 15. Fleta, li. 1. ca. 22. Britton, fo. 16. 19 H. 6. 47.

Before this ſtatute it was petit treaſon, *ſi quis falſaverit ſigillum domini ſui de cujus familia fuit.* Britton agreeth herewith. But theſe are taken away by this act, and all other ſaving theſe, that are here expreſſed.

(3) *Quant home feculer ou de religion tua ſon prelate a que il doit foy et obedience.*] This clauſe is underſtood only of an eccleſiaſticall perſon, be he ſecular, or regular, if he kill his prelate, or ſuperiour, to whom he oweth faith, and obedience, it is petit treaſon: and ſo it was at the common law. And petit treaſon doth preſuppoſe a truſt, and obedience in the offender, either civill, as in the wife and ſervant, or eccleſiaſticall, as in the eccleſiaſticall perſon.

40 Aſſ. ubi ſupra. et 16 El. ubi ſup.

Aidors, abettors, and procurers of any of theſe petit treaſons, are within this law.

19 H. 6. 47. by all the judges.

If the ſervant kill his miſtris, viz. his maſters wife, this is treaſon (as hath been ſaid) not by equity, for that is denied as well in petit

petit treaſon, as high treaſon, but it is within the letter of this ſtatute, for ſhe is a maſter.

In high treaſon there is no acceſſories, but all be principalls, and therefore whatſoever act or conſent will make a man acceſſory to a felony, before the act done, the ſame will make him a principall in caſe of high treaſon. But in caſe of petit treaſon, there may be acceſſories, either before, or after the act done, as in caſe of murder or homicide. [21]

Here it appeareth that acts of parliament may bind men of the church, ſecular, or regular, and no benefit of clergy allowed unto them in caſe of treaſon: but [a] hereof you ſhall read at large in the expoſition of the 15. chapter of *Articuli cleri*.

[a] See the 2. pt of the Inſtitutes. Artic. cleri. ca. 15. Hil. 3. R. 2. coram rege Rot. 8. London. Jo. Imperial's caſe.

(3) *Et de tiel manner de treaſon forfeiture des eſcheats apperteinont a cheſcun ſeignior de ſon fee proper.*] See hereof hereafter in the chapter of forfeiture. [b] If a man ſeiſed in fee of a fair, market, common, rent charge, rent ſeck, warren, corrody, or any other inheritance, that is not holden, and is attainted of felony, the king ſhall have the profits of them during his life: but after his deceaſe, ſeeing the blood is corrupted, they cannot deſcend to the heir, * nor can they eſcheat becauſe they be not holden, they periſh and are extinct by act in law: for in eſcheats for petit treaſon or felony, a tenure is requiſite, as well in the caſe of the king, as of the ſubject.

For eſcheats ſee the 1. part of the Inſtitut. ſect. 1. fo. 13. a.

[b] See before, cap. 1. verbo, des terres et tenements, &c.

* See 1 pt. of the Inſtitutes, fo. 13. verb. Avera la terre per eſcheat. Mic. 4 H. 4. coram rege. Rot. 22. Anglia.

An approver in caſe of felony, refuſing the combate with the appellee, ſhall have like judgment that is for petit treaſon, *probator recuſans duellum adjudicatur ſuſpendi, et trahi in odium falſæ accuſationis:* but yet it is not petit treaſon, becauſe it is none of the three ſpecified in this act.

The caſe which Shard reciteth in 40 Aſſ. that a Norman being leader of an Engliſh ſhip, who had Engliſh men with him, and robbed divers upon the ſea, and were taken and found guilty: and as to the Norman it was but felony (becauſe Normandy was loſt by king John, and was out of the ligeance of E. 3.) and as to the Engliſh it was adjudged treaſon, and the offenders drawn and hanged, which was the judgement of petit treaſon: but this caſe muſt be intended to fall out before this ſtatute of 25 E. 3. for it is none of the petit treaſons mentioned in this act.

40 Aſſ. 25. Vide 2 H. 5. cap. 6.

Et pur ceo que pluſors auters caſes de ſemblables treaſon (1) *purront eſcheer en temps avener, queux home ne purra penſer ne declarer en preſent: aſſentu eſt, que ſi autre caſe ſuppoſe* (2) *treaſon* (3), *que neſt eſpecifie paramount* (4), *aviegne de novel devant aſcun juſtice, demoerge le juſtice ſans aler a judgment de treaſon, tanque per devant noſtre ſeignior le roy en ſon parliament* (5) *ſoit le caſe mre. et declare* (6), *le que le ceo doit eſtre adjudge treaſon, ou auter felony.*

Rerum progreſſus oſtenaunt multa, quæ initio præ-videri non poſſunt.

And becauſe that many other like caſes of treaſon may happen in time to come, which a man cannot think nor declare at this preſent time: it is accorded, that if any other caſe ſuppoſed treaſon, which is not above ſpecified, doth happen before any juſtice, the juſtice ſhall tarry without going to judgement of the treaſon, till the cauſe be ſhewed and declared before

before the king and his parliament, whether it ought to be judged treaſon or other felony.

(1) *Semblable treaſon.*] In this caſe, the judges ſhall not judge *à ſimili*, or by equity, argument, or inference of any treaſon, high or petit, for no like caſe ſhall be adjudged treaſon, &c. And note this branch extendeth (as hath been ſaid) to the offence, viz. treaſon, and not to tryall, judgement, or execution.

(2) *Si auter caſe ſuppoſe treaſon.*] No other caſe, though of as high or higher nature, &c. ſhall be adjudged treaſon high or petit, as before it appeareth in the caſe of paricide, *anno* 1 *Mariæ*, *ubi ſupra.*

(3) *Treaſon.*] Either high treaſon, or petit treaſon, ſo as this branch extendeth as hath been ſaid to the offence of treaſon only.

[22]

(4) *Que neſt ſpecifie paramount.*] This word [*ſpecifie*] is to be ſpecially obſerved, for it is as much to ſay, as particularized, or ſet downe particularly: ſo as nothing is left to the conſtruction of the judge, if it be not ſpecified and particularized before by this act. A happy ſanctuary or place of refuge for judges to flye unto, that no mans blood and ruine of his family do lie upon their conſciences againſt law. And if that the conſtruction by arguments *à ſimili*, or *à minori ad majus* had been left to judges, the miſchiefe before this ſtatute would have remained, viz. diverſity of opinions, what ought to be adjudged treaſon, which this ſtatute hath taken away by expreſſe words: and the ſtatute of 1 Mar. doth repeale all treaſons, &c. but only ſuch as be declared and expreſſed in this act of 25 E. 3. wherein this word [expreſſed] is to be obſerved.

See the expoſition upon the ſtatute, *de frang. priſonam.* 1 H. 6. 5. 9 E. 4. 26, &c. See 1 Mar. of Juſtice Daliſon's report, ubi ſupra.

1 Mar. cap. 1.

In the parliament holden *anno* 5 H. 4. the earle of Northumberland came before the king and lords in parliament, and by his petition to the king, acknowledged to have done againſt his allegiance: and namely, for gathering of power and giving of liveries, whereof he prayeth pardon: and the rather, that upon the kings letters he yeelded himſelfe, and came to the king unto Yorke, where he might have kept himſelfe away. The which petition the king delivered to the juſtices by them to be conſidered. Whereupon the lords made proteſtation, that the order thereof belonged to them, as peers of the parliament, to whom ſuch judgement belonged in weighing of this ſtatute of 25 E. 3. &c. and they judged the ſame to be no treaſon, nor felony, but only treſpaſſe finable at the kings will. And the opinion in 27 Aſſ. is denied, that if one of the indicters diſcover the counſell of the king, that it ſhould be treaſon; becauſe it is not ſpecified before in this act, and therefore neither high treaſon, nor petit treaſon.

Rot. Parl. 5 H. 4. nu. 11, 12. See nu. 15. Ibid.

27 Aſſ. p. 63.

(5) *Tanque ſer devant le roy et ſon parliament.*] By this it is apparent, that any like or other caſe ought to be declared by the whole parliament, (and not by the king and lords of the upper houſe only, or by the king and the commons, or by the lords and commons.) And ſo was it done by the whole court of parliament in 3 R. 2. *ubi ſupra.* 5 Eliz. 18 Eliz. *ubi ſupra*, and many other acts of parliament.

Rot. Par. 17 R. 2. nu. 20.

John duke of Gwyen and of Lancaſter, ſteward of England, and Thomas duke of Gloceſter, conſtable of England, the kings uncles,

uncles, complained to the king, that Thomas Talbot knight, with other his adherents, conſpired the death of the ſaid dukes in divers parts of Cheſhire, as the ſame was confeſſed and well knowne, and prayed that the parliament might judge of the fault (which petition was juſt, and according to this branch of the ſtatute of 25 E. 3.) but the record ſaith further: whereupon the king and lords in the parliament adjudged the ſame fact to be open and high treaſon: which judgement wanting the aſſent of the commons, was no declaration within this act of 25 E. 3. becauſe it was not by the king and his parliament according to this act, but by the king and lords only.

(6) *Soit le caſe monſtre et declare, &c.*] This declaration may be abſolute, or *ſub modo*, for a time. 13 El. cap. 1, 2. 14 El. ca. 1, 2. &c.

By this which hath been ſaid it manifeſtly appeareth, what damnable and damned opinions thoſe were concerning high treaſon, of Treſilian chiefe juſtice of the kings bench, Sir Robert Belknap chiefe juſtice of the common bench, Sir John Holt, Sir Roger Fulthorp, and Sir William Burghe, knights, fellowes of the ſaid Sir Robert Belknap, and of John Lockton one of the kings ſerjeants, that were given to king R. the 2. at Nottingham, in the eleventh yeare of his reigne. But more deteſtable were the opinions of the juſtices in 21 R. 2. and of Hanckford and Brinchley the kings ſerjeants, (and the rather, becauſe they took no example by the puniſhment of the former) which affirmed the ſaid opinions to be good and lawfull, ſaving Sir William Thirning chiefe juſtice of the common bench gave this anſwer: That declaration of treaſon not declared belongeth to the parliament; but to pleaſe, he ſaid, that if he had been a lord or a peer of parliament, if it had been demanded of him, he would have made the like anſwers. Theſe juſtices and ſerjeants being called in queſtion in the parliament holden *anno* 1 H. 4. for their ſaid opinions, anſwered as divers lords ſpirituall and temporall did) that they durſt no otherwiſe do, for feare of death. It was thereupon enacted, that the lords ſpirituall and temporall, or juſtices, be not from thenceforth received to ſay, that they durſt not for feare of death to ſay the truth. Which opinions being ſo manifeſtly againſt our ſaid act of 25 E. 3. afterwards in the parliament holden 1 H. 4. it is affirmed by authority of parliament, that in the ſaid parliament of 21 R. 2. divers ſtatutes, judgements, ordinances, and ſtabliſhments were made, ordained, and given, erroniouſly and dolefully in great diſheriſon and finall deſtruction and undoing of many honourable lords, and other liege people of this realme, and of their heires for ever. And therefore not only that parliament of 21 R. 2. and the circumſtances and dependances thereupon, are wholly reverſed, revoked, voided, undone, repealed, and adnulled for ever, but alſo the parliament holden in 11 R. 2. by authority of which parliament, Treſilian, Belknap, and the reſt of thoſe falſe juſtices and ſerjeants aforeſaid were attainted, is confirmed, for that it was (as there the parliament affirmeth) for the great honour and common profit of the realme.

Anno 21 R. 2. in Latin.

11 R. 2. ca. 1. and 4.

[23]

Rot. Parl. 1 H. 4. nu. 97.

Melius eſt omnia mala pati quam malo conſentire.

1 H. 4. ca. 3.

See the conſequence of erroneous opinions in caſe of high treaſon.

1 H. 4. cap. 4.

Et ſi per caſe aſcun home de ceſt roialme chivache armee, &c.] And if percaſe any man of this realme ride armed, &c. For expoſition hereof, ſee the chapter hereafter againſt riding or going armed.

For

1 Mar. cap. 1. *Seſſione prima.* The like ſtatute was made, *anno* 1 E. 6. ca. 12. See the ſtature of 1 H. 4. cap. 10. to the like effect.

For the better inſtruction of the reader to diſcerne what offences be high treaſon or petit treaſon at this day, it ſhall be neceſſary to adde hereunto the ſtatute of 1 Mar. whereby it is enacted, [That no act, deed, or offence, being by act of parliament or ſtatute made treaſon, petit treaſon, or miſpriſion of treaſon, by words, writing, ciphering, deeds, or otherwiſe whatſoever, ſhall be taken, had, deemed, or adjudged to be high treaſon, petit treaſon, or miſpriſion of treaſon, but only ſuch as be declared and expreſſed to be treaſon, petit treaſon, or miſpriſion of treaſon, in or by the act of parliament or ſtatute made in the 25 yeare of the raigne of the moſt noble king of famous memory, king Edward the third, touching or concerning treaſon, or the declaration of treaſon, and none other, &c. any act or acts of parliament, ſtatute, or ſtatutes, had or made at any time heretofore or after the ſaid 25 year of king E. 3. or any other declaration or matter to the contrary in any wiſe notwithſtanding.]

Inter leges Canuti, cap. 1. *Inprimis juſtæ leges ut efferantur injuſtæ deprimantur.* Aliter in antiquo MS. *Inprimis ut juſtæ leges erigantur, injuſtæ jubvertantur.*

Before this act ſo many treaſons had been made and declared by act of parliament ſince this act of 25 E. 3. ſome in particular, and ſome in generall, and in ſuch ſort penned, as not only the ignorant and unlearned people, but alſo learned and expert men were many times trapped and ſnared: and ſometimes treaſons made or declared in one kings time, were abrogated in another kings time, either by ſpeciall or generall words: ſo as the miſchief before 25 E. 3. of the uncertainty what was treaſon, and what not, became to be ſo frequent and dangerous, as the ſafeſt and ſureſt remedy was, by this excellent act of 1 Mar. to abrogate and repeale all, but only ſuch as are ſpecified and expreſſed in this ſtatute of 25 E. 3. By which law, the ſafety both of the king and of the ſubject, and the preſervation of the common-weale is wiſely and ſufficiently provided for, in ſuch certainty, as *nihil relictum eſt arbitrio judicis.* And certainly the two rules recited in the preamble of the ſaid act of 1 Mariæ, are aſſuredly true. The firſt, [that the ſtate of a king ſtandeth and conſiſteth more aſſured by the love and favour of the ſubject toward their ſoveraigne, then in the dread and fear of lawes made with rigorous pains and extreme puniſhment for not obeying their ſoveraigne.] And the other, [that lawes juſtly made for the preſervation of the common-weale without extreme puniſhment or penalty, are more often, and for the moſt part better obeyed and kept, then lawes and ſtatutes made with great and extreme puniſhment.] *Mitius imperanti melius paretur.*

[24]

Seneca.

In which act five notable things are to be obſerved. Firſt, it extendeth (without exception) to all high treaſons made by any act of parliament ſince the ſaid act of 25 E. 3. Secondly, to all declarations of high treaſons by any act of parliament ſince the ſaid act of 25 E. 3. (as of the ſaid declaration in 3 R. 2. of killing an ambaſſadour and the like.) Thirdly, to all petit treaſons made or declared by any act of parliament ſince the ſaid act of 25 E. 3. Fourthly, albeit miſpriſion of treaſon is not mentioned in the act of 25 E. 3. yet every miſpriſion of any treaſon made or declared ſince that act by any act of parliament, is abrogated. Fifthly, no offence to be treaſon, petit treaſon, or miſpriſion of treaſon, but only ſuch as be declared and expreſſed to be treaſon, petit treaſon, or miſpriſion of treaſon by the ſaid act of 25 E. 3. Here three things are to be obſerved: firſt, that this word [expreſſed] excludeth all implications

implications or inferences whatſoever. Secondly, here miſpriſion of treaſon is taken for concealement of high treaſon or petit treaſon, and only of high treaſon or petit treaſon ſpecified and expreſſed in the act of 25 E. 3. Thirdly, that no former judgement, attainder, preſident, reſolution, or opinion of judges or juſtices of high treaſon, petit treaſon, or miſpriſion of treaſon, other then ſuch as are ſpecified and expreſſed in the ſaid act of 25 E. 3. are to be followed or drawne to example: for the words be direct and plaine, [that from henceforth, no act, deed, or offence, &c. ſhall be taken, had, deemed, or adjudged to be treaſon, petit treaſon, or [a] miſpriſion of treaſon, but only ſuch as be declared and expreſſed in the ſaid act of 25 E. 3. &c. any act of parliament or ſtatute after 25 E. 3. or any other declaration or matter to the contrary notwithſtanding.] So as there is no high treaſon, petit treaſon, or miſpriſion of any treaſon made or declared by any act of parliament or otherwiſe ſince the act of 25 E. 3. but only ſuch as have been made ſince the ſaid act of 1 Mariæ, and of thoſe only ſuch as were made [b] perpetuall, and not during the life of queen Mary or of queen Elizabeth, whereof there be divers which now are expired, which you may reade being all in print. But there wanted nothing to the perfection of the ſtatute of 25 E. 3. but a limitation of ſome certaine time wherein the offender ſhould be accuſed. [c] *Poſt intervallum temporis accuſator non erit audiendus, niſi docere poteſt ſe fuiſſe juſtis rationibus impeditum.*

Or the declaration of treaſon, &c. [d] Declarations made during the naturall life of queen Elizabeth ceaſed by her death: for declarations may have limitations as well as ſtatutes introductory of new lawes.

There is another excellent branch of a ſtatute made * in 1 & 2 Ph. & Mar. in theſe words. [And be it further enacted by the authority aforeſaid, that all trials hereafter to be had, awarded, or made for any treaſon, ſhall be had and uſed only according to the due order and courſe of the common law.]

All trials.] [f] Upon theſe words many things have been obſerved by others. Firſt, that the letter of this act extendeth only to triall of high treaſons, or petit treaſons, and not to miſpriſion. Secondly, foraine treaſons are to be tried by the ſtatute [g] of 35 H. 8. cap. 2. and ſo it was reſolved by all the juſtices of England in Orurks caſe, and had been ſo reſolved before. But for trials of treaſons to be had in Wales, or where the kings writ runneth not, in ſuch ſhires as the king ſhall aſſigne by his commiſſion by the * ſtatute of 32 H. 8. ca. 4. are abrogated by this act, becauſe they are triable by the law.

[h] It hath been holden, that upon the triall of miſpriſion of treaſon there muſt be two lawfull witneſſes, as well upon the triall, as upon the indictment, as it was reſolved by the juſtices in the lord Lumleyes caſe, Hil. 14. Eliz. reported by the lord Dier, under his own hand, which we have ſeen, but left out of the print, which for other purpoſes is cited hereafter. Thirdly, it hath beene holden, that this act extendeth not to the indictment of any treaſon, but to the triall by peers, if the offender be noble: or by freeholders, if the offender be under the degree of nobility: and therefore upon the indictment which is in manner of an accuſation, by the ſtatutes of 1 E. 6. and 5 E. 6. two lawfull witneſſes are requiſite:

[a] That is, of ſuch treaſon, high or petit, as is expreſſed in the act of 25 E. 3. and of no other treaſon.

[b] 1 Mar. cap. 6. 1 & 2 Ph. and Mar. cap. 11. 5 Eliz. ca. 1. and 11. 18 Eliz. cap. 1. 13 Eliz. cap. 2. 23 Eliz. cap. 1. 27 Eliz. cap. 2. 3 Jac. cap. 4.

[c] Bracton, lib. 3. fol. 118. b.

[d] 13 Eliz. cap. 1. 14 Eliz. cap. 1. and cap. 2.

[e] 1 & 2 Ph. and M. cap. 10.

[f] See the ſecond part of the Inſtitutes, Mag. Carta, cap. 29. Verbo (per judicium parium.)

[g] 35 H. 8. cap. 2. 3 Mar. Dier, 132. lib. 7. fol. 23. in Calvin's caſe. Paſch. 33 Eliz. Orurk's caſe.

* 32 H. 8. cap. 4.

[h] 1 E. 6. cap. 12. 5 E. 6. cap. 11. Both which are mentioned in the next ſection. Hill. 14 Eliz. Dier, MS. *Nota.* This is the laſt reſolution of the judges in this point. At this time Catlin and Dier were chief juſtices, and Sanders chiefe baron, &c.

2 E. 6. cap. 12. 5 E. 6. cap. 11. See 23 El. cap. 1. See before verb. [*De ceo provable, ment ſoit attaint.*]

quiſite: the words of the ſtatute of 1 E. 6. in the laſt branch be, [that none ſhall be indicted, arraigned, condemned, or convicted for any treaſon, petit treaſon, miſpriſion of treaſon, or for any words before ſpecified to be ſpoken, after the ſaid firſt day of February, for which the ſame offender or ſpeaker ſhall in any wiſe ſuffer pains of death, impriſonment, loſſe or forfeiture of his goods, chatels, lands, or tenements, unleſſe he be accuſed by two ſufficient and lawfull witneſſes, or ſhall willingly without violence confeſſe the ſame.

Nota that [before ſpecified] doe refer to the words mentioned before in the act. 1. It is manifeſt by the connexion of the words, viz. [for any words before ſpecified to be ſpoken, &c.] 2. The treaſons in 25 E. 3. were mentioned before. 3. The firſt words be [for any treaſon, petit treaſon, miſpriſion of treaſon, &c.]

See 1 El. cap. 6. Stanf. Pl. Coron. 89. and 164. 4 Mar. Coron. Br. 220. Dier, 2 Mar. 99. and 3 Mar. 132.

* Nota the generality of theſe words. *Regula, verba generalia generaliter ſunt intelligenda.* See hereafter c. 49. of Piracy, &c.

And by 5 E. 6. ca. 11. it is provided by the laſt clauſe ſave one, [that none ſhall be indicted, arraigned, condemned, convicted, or attainted for any of the treaſons or offences aforeſaid, or for any * other treaſons that now be, or hereafter ſhall be, which ſhall hereafter be perpetrated, committed, or done, unleſſe the ſame offender be thereof accuſed by two lawfull accuſers, &c. unleſſe the ſaid party arraigned ſhall willingly, without violence confeſſe the ſame.] Here two things are to be obſerved. 1. The particular penning of both theſe acts, viz indicted, arraigned, convicted, &c. and the words of 1 & 2 of Ph. & Mar. extend to tryalls only, and not to the indictment. 2. Two lawfull accuſers in the act of 5 E. 6. are taken for two lawfull witneſſes, for by two lawfull accuſers, and accuſed by two lawfull witneſſes (as it is ſaid 1 E. 6.) is all one: which word (accuſers) was uſed, becauſe two witneſſes ought directly to accuſe, that is, charge the priſoner, for other accuſers have we none in the common law, and therefore lawfull accuſers muſt be ſuch accuſers as law allow. And ſo was it reſolved in the Lo. Lumleys caſe by the juſtices: for if accuſers ſhould not be ſo taken, then there muſt be two accuſers, by 5 E. 6. and two witneſſes by 1 E. 6. And the ſtrange conceit in 2 Mar. that one may he an accuſer by hearſay, was utterly denied by the juſtices in the Lo. Lumleys caſe. And this word (awarded) in the ſtatute of 1 & 2 Ph. and Mar. extendeth to the tryall upon the arraignment, and not to the indictment; for that is not ſaid to be awarded.

Hil. 14 El. Lo. Lumley's caſe. Ubi ſupra. 2 Mar. Dier, 99, 100. Thomas' caſe.

[a] Mich. 13 & 14 El. Rolſton's caſe.

And it was reſolved by all the juſtices in [a] Rolſtons caſe upon the rebellion in the north, that theſe words [ſhall willingly without violence confeſſe the ſame] are to be underſtood where the party accuſed upon his examination before his arraignment, willingly confeſſed the ſame without violence, that is, willingly without any torture: and is not meant of a confeſſion before the judge, for he is never preſent at any torture, neither upon his arraignment was ever any torture offered. And here commeth another [b] ſtatute made in 1 & 2 Mar. to be conſidered, by which it is provided, that treaſon for the counterfeiting and impairing of the coin currant in this realm, &c. the offender therein, &c. ſhall be indicted, arraigned, tried, convicted, or attainted by ſuch like evidence, and in ſuch manner and form, as hath been uſed and accuſtomed within this realm, at any time before the firſt year of king E. 6. &c.

[b] 1 & 2 Ph. and Mar. c. 11. ſupra.

Wherein

Wherein the ſpeciall penning of this act is to be obſerved, which in caſe of treaſon concerning the counterfeiting or impairing of coin, &c. hath by particular words reſtored the evidence requiſite by the common law, before the ſtatute of 1 E. 6. as well upon the indictment as the triall. But the act of 1 & 2 Ph. and Mar. cap. 10. extends to trials only in other caſes of high treaſon, and therefore that act extendeth not to the indictment of other high treaſons. Alſo it is moſt neceſſary (as many doe hold) that there ſhould be two lawfull accuſers, that is, two lawfull witneſſes at the time of the indictment, for that it is commonly found in the abſence of the party accuſed, and it may be when the party ſuſpected is beyond ſea, or in remote parts, and may be outlawed thereupon; and therefore ſeeing the indictment is the foundation of all, it is moſt neceſſary to have ſubſtantial proof in a cauſe ſo criminall, where *probationes oportent eſſe luce clariores.* Laſtly, * if the indictment were part of the tryall, then ought he that is noble, and a lord of parliament be indicted of high treaſon, &c. by his peers: for the tryall of him (without queſtion) muſt be by his peers: but the indictment of peers of the realm is always by free-holders, and not by their peers, as hereafter ſhall appear. We have been the longer herein in reſpect of ſome variety of opinion (for want of due and intire conſideration had of all and every part of that which hath been ſaid) upon ſerious ſtudy touching this point, without reſpect of a common wandring opinion.

And it ſeemeth that by the ancient common law one accuſer, or witneſſe was not ſufficient to convict any perſon of high treaſon: [a] for in that caſe, where is but one accuſer, it ſhall be tried before the conſtable and marſhall by combat, as by many records appeareth. [b] But the conſtable and marſhall have no juriſdiction to hold plea of any thing, which may be determined or diſcuſſed by the common law. And that two witneſſes be required, appeareth by our [c] books, and I remember no authority in our books to the contrary: and the common law herein is grounded upon the law of God expreſſed both in the old and new Teſtament: [d] *in ore duorum aut trium teſtium peribit qui interficietur: nemo occidatur uno contra ſe dicente teſtimonium.*

And this ſeemeth to be the more clear in the triall by the peers, or nobles of the realm, becauſe they come not *de aliquo vicineto*, whereby they might take notice of the fact in reſpect of *vicinitie*, as other jurors may doe.

Having now rehearſed what others have ſaid and holden, we upon due conſideration had of the whole matter will ſet down our own opinion, and reaſons, in theſe four points following. Firſt, that the ſtatute of [e] 5 E. 6. cap. 11. is a generall law, and extends to all high treaſons, as well by the common law declared by the ſtatute of 25 E. 3. as to any other ſtatute made or to be made, the negative words of which ſtatute be: [no perſon ſhall be [f] indicted, arraigned, convicted, condemned, or attainted for any treaſon, that now is, or hereafter ſhall be, &c.] Which words without all queſtion are generall, and ſo to be taken. The words of that ſtatute be further, [unleſſe the ſame offender be accuſed by two lawful accuſers,] theſe two lawful accuſers are in judgement of law taken for two lawful witneſſes, and that for two cauſes: firſt, they muſt be lawful, that is, allowed by the laws of the realm: and by the law, upon

1 & 2 Ph. and Mar. cap. 10.

* [26]

See Magna Cart, c. 29. and the expoſition thereupon.

[a] Pat. 25 E. 3. part 1. nu. 16. Rot. Parl. 21 R. 2. nu. 19. 21. the D. of Norff. caſe. Rot. Pat. 3 H. 4. Balleſhul's caſe. Rot. Vaſcon. 9 H. 4. nu. 14. John Bolemer's caſe. Rot. Parl. 2 H. 6. nu. 9. the earl of Ormond's caſe. Rot. Pat. 8 H. 6. pt. 2. m. 7. between Upton and Dowy. Vide the 4. part of the Inſtitutes. cap. the Court of Chivalry, &c. See Bract. lib. 3. fo. 119. a.

[b] 13 R. 2. cap. 2.

[c] Mirror, ca. 3 §. ordenance de attaint. Bract. l. 5. f. 354. 48 E. 3. 30. 35 H. 6. 46. Fort. ca. 32. 15 E. 4. f. 1. Pl. Com. fo. 8.

[d] Deu. 17. 6. 19. 15 Mat. 18. 16. John 18. 23. 2 Cor. 13. 1. Heb. 10. 28.

[e] And ſo I hold the ſtatute of 1 E. 6. c. 12. to be a generall law, and to extend to all high treaſons, &c.

[f] Nota as well upon the indictment as the arraignment of treaſon there ought to be two accuſers. See Dier, 2 & 3 Ph. and Mar. 132.

upon the arraignment of the priſoner upon the indictment of treaſon, no other accuſer can be heard, but witneſſes only. Secondly, the words of the ſtatute are [which ſaid accuſers at the time of the arraignment of the party accuſed, if they be then living, ſhall be brought in perſon before the party ſo accuſed, and avow, and maintain that which they have to ſay to prove him guilty of the treaſon, unleſſe the party arraigned ſhall willingly without violence confeſſe the ſame,] as by that act it appeareth. Now to avow and maintain that which they have to ſay to prove him guilty of the treaſon, is the proper office and duty of witneſſes, and ſo it is ſaid in the ſtatute of [g] 1 E. 6. c. 12, in the laſt clauſe (by two lawful witneſſes.) See the ſtatute of 5 El. c 1. where it is ſaid [accuſed by good and ſufficient teſtimony:] and to the ſame intent, the ſtatute of 1 & 2 Ph. and Mariæ, cap. 11. for the word [accuſed.]

1. *Puniantur accuſatores penes dominum regem, quòd amodò rex eis de facili non credat: et talis pœna fiat eis, qualis debeat fieri illis, qui injuſte fideles dni. regis exhæredari et deſtrui fecerunt, &c.*

2. That this act of 5 E. 6. extend as well to petit treaſon, as high treaſon, for the words be [any treaſon] and ſo doth the ſtatute of 1 E. 6. cap. 12.

3. That the ſtatute of 1 & 2 Ph. and Mar. cap. 10. doth not abrogate the ſaid act of 1 E. 6. or of 5 E. 6. For that act of 1 & 2 Ph. and Mar. extends only to trialls by the verdict of twelve men *de vicineto*, of the place where the offence is alleadged, and [k] the indictment is no part of the triall, but an information or declaration for the king, and the evidence of witneſſes to the jury is no part of the triall, for by law the tryall in that caſe is not by witneſſes, but by the verdict * of twelve men, and ſo a manifeſt diverſity between the evidence to a jury, and a tryall by jury. And the word [awarded] in that ſtatute doth prove that that act extended only to the *venire facias* for trial, for neither the indictment nor the evidence can be ſaid to be awarded: *veritas quæ minime defenſatur, opprimitur, et qui non improbat, approbat. Et ſic liberè animam meam liberavi.*

[a] The tryall againſt an aliennee, that lived here under the protection of the king, and amity being between both kings, for high treaſon, ſhall by force of this act of 1 & 2 Ph. & Mar. be tried according to the due courſe of the common law, and therefore in that caſe he ſhall not be tried *per medietatem linguæ*, as he ſhall be in caſe of petit treaſon, murder, and felony, if he prayeth it.

4. [b] That a tryall in a forein county upon examination before three of the councell, &c. by the ſtatute of 33 H. 8. cap. 23. is abrogated by this act of 1 & 2 Ph. and Mar. being a tryall contrary to the due courſe of the common law, which is to have it tryed by jurours of the proper county, [c] but the indictment being found in the proper county, it may be by ſpeciall commiſſion heard and determined before commiſſioners in any forein county, but the tryall muſt be by jurours of the proper county; and this is warranted by the courſe of the common law. And albeit when the term begins, all commiſſions of oier and terminer in the county where the kings bench ſit, be ſuſpended during the term, yet if an indictment be found before ſuch commiſſioners before the tearm, there may be a ſpeciall commiſſion made to commiſſioners in the ſame county, ſitting the kings bench in that county, to

[g] 1 E. 6. cap. 12. the laſt clauſe. 5 El. cap. 1. 1 & 2 Ph. and Mar. cap. 11. Bract. li. 3. f. 118. *Qui accuſat integræ famæ ſit, et non criminoſus.*

[i] Stat. de Kenelw. ſecunda parte, Vet. Mag. Cart. cap. 16.

[k] See the firſt part of the Inſtitutes. ſect. 194. See Forteſcue, cap. 26, 27. Juries ought to be informed by evidences, and witneſſes.

*[27]

[a] 27 E. 3. cap. 8. 28 E. 3. cap. 18. 8 H. 6. cap. 29. 1 Mar. fo. 144. Shirley's caſe, and ſo it was reſolved by all the judges, Hil. 36 El. in the caſe of doctor Lopez, Emanuel Loyſie, and Stephen Ferreira de Gama.

[b] 33 H. 8. c. 23. 3 Mar. Dier. 132. Dier, 12 El. 286. b. li. 11. fo. 63. a. in doctor Foſter's caſe.

[c] 27 Aſſ. p. 11. 21 Aſſ. p. 12. W. 1. c. 3. &c. Mic. 25 & 26 El. per les juſtices in Somerville's and Arden's caſe. Dier 12 El. 286. b. All this was reſolved, Mic. 1 Ja. in Sir Walter Raleigh's caſe. Pl. Com. 388. Comit de Leiceſter's caſe.

to hear and determine the ſame during the tearm: for the kings bench hath no power to proceed thereupon, till the indictment be before them. And it is the better, if the ſpeciall commiſſion bear teſte after the beginning of the tearm. Note a diverſity between generall commiſſions of oier and terminer, and ſuch a ſpeciall commiſſion; and the court of kings bench may be adjourned, and in the mean time the commiſſioners may ſit there.

[d] And where it is provided by the ſtatute of 33 H. 8. cap. 23. that peremptory challenge ſhould not from thenceforth be admitted or allowed in caſes of high treaſon, or miſpriſion of treaſon: [e] this branch is abrogated by the ſaid act of 1 Mar. For the end of challenge is to have an indifferent tryall, and which is required by law; and to bar the party indicted of his lawfull challenge, is to bar him of a principall matter concerning his tryall: and all acts of parliament concerning incidents to tryalls contrary to the courſe of the common law, are abrogated by the ſaid words, [and that all trialls hereafter, &c.] but all this is to be underſtood of perſons under the degree of nobility; for in caſe of a triall of a noble man, lord of parliament, he cannot challenge at all any of his peers.

[f] Henry Garnet ſuperiour of the jeſuites in England upon his arraignment for the powder treaſon, did challenge Burrel a citizen of London peremptorily, and it was allowed unto him by the reſolution of all the judges; [g] ſo as in caſe of high treaſon, or miſpriſion of high treaſon, a man may challenge 35. peremptorily, which is under three juries, but more he cannot.

Laſtly, all ſtatutes made before the ſaid act of 1 & 2 Ph. & Mar. for tryall of high treaſon, petit treaſon, or miſpriſion of treaſon, contrary to the due courſe of the common law, are abrogated by the ſaid act of 1 & 2 Ph. & Mar. and tryalls by the due courſe of the common law, with challenges incidents in thoſe caſes are reſtored.

[h] If a man be indicted of high treaſon, he may at this day plead a forein plea, as he might doe by the common law, and ſhall be tryed in the forein county; but otherwiſe it is in caſes of petit treaſon, murder, or felony, for there it ſhall be tryed in the county where the indictment is taken.

And foraſmuch as the proceeding againſt a noble peer of the realm, being a lord of parliament in ſome points agrees, and in other points differeth from the proceeding againſt a ſubject under the degree of nobility: it ſhall be neceſſary to ſhew wherein they agree, and wherein they differ.

1. The noble peer of the realme muſt be indicted before commiſſioners of oier and terminer, or in the kings bench, if the treaſon, miſpriſion of treaſon, felony, or miſpriſion thereof be committed in that county where the kings bench ſit, as it was reſolved in the caſe of Tho. el. of N. in an. 13. Eliz. And this is common to both degrees to be indicted by jurors of that county where the offence was committed.

2. When he is indicted, then the king by his commiſſion under the great ſeale conſtitutes ſome peer of the realme, to be *hac vice*, ſteward of England: for his ſtile in the commiſſion, is, *(ſeneſchallus Angliæ)* who is judge in this caſe of the treaſon or felony, or of the miſpriſion of the ſame committed by any peer of the realm.

[d] 33 H. 8. c. 23.

[e] And ſo it was reſolved. an. 1 Ja. in Sir Walter Raleighs caſe, by all the judges and had been reſolved ſo before. Stan. pl. cor. 157.

[f] 3. Ja. R. in Garnets caſe. And ſo it was reſolved, M 25 & 26 El. in Somerviles and Ardens caſe.

[g] Br. tit. Challenge, 217.

[h] 22 H. 8. c. 14. 32 H. 8. c. 3. See 4 H. 8. c. 2. and 22 H. 8. c. 2. pleading, &c. for being taken out of ſanctuary in a forain county in caſe of murder or felony. See hereafter, cap. Sanctuary, all ſanctuaries taken away: and note that the ſtat. of 22 H. 8. &c. extend only to indictments and not to appeals.

[28]

1 H. 4. 1.

1 H. 4. 1.
10 E. 4. 6. b.
13 H. 8. 12

This commiſſion reciteth the indictment generally as it is found: and power given to the lord ſteward to receive the indictment, &c. and to proceed, *ſecundum legem et conſuetudinem Angliæ*. And a commandement is given thereby to the peers of the realme, to be attendant and obedient to him: and a commandement to the lieutenant of the Tower to bring the priſoner before him.

3. A *certiorari* is awarded out of the chancery to remove the indictment it ſelfe before the ſteward of England *indilatè*, which may either beare date the ſame day of the ſtewards commiſſion, or any day after.

4. The ſteward directs his precept under his ſeale to the commiſſioners, &c. to certifie the indictment ſuch a day and place.

5. Another writ goeth out of the chancery directed to the lieutenant of the Tower, to bring the body of the priſoner before the ſteward at ſuch day and place as he ſhall appoint.

6. The lord ſteward maketh a precept under his ſeale to the lieutenant of the Tower, &c. and therein expreſſeth a day and place when he ſhall bring the priſoner before him.

7. The ſteward maketh another precept under his ſeale to a ſerjeant at armes, to ſummon *tot et tales dominos, magnates, et proceres hujus regni Angliæ prædicti R. comitis E. pares, per quos rei veritas melius ſciri poterit, quòd ipſi perſonaliter compareant coram prædicto ſeneſchallo apud Weſtm. tali die et hora, ad faciend. ea quæ ex parte domini regis forent facienda, &c.* Wherein four things are to be obſerved. Firſt, that all theſe precepts moſt commonly beare date all in one day. Secondly, that no number of peers are named in the precept, and yet there muſt be twelve or above. Thirdly, that the precept is awarded for the returne of the peers before any arraignment or plea pleaded by the priſoner. Fourthly, that in this caſe the lords are not *de vicineto*, and therefore the ſitting and triall may be in any county of England. And herein are great differences between the caſe of a peer of the realme, and of one under the degree of nobility.

8. At the day, the ſteward with ſix ſerjeants at armes before him takes his place under a cloth of eſtate, and then the clerk of the
1 H. 4. 1. crown delivereth unto him his commiſſion, who redelivereth the ſame unto him. And the clerk of the crown cauſeth a ſerjeant at armes to make three oyes, and commandement given in the name of the lord high ſteward of England to keep ſilence: and then is the
1 H. 4. 1. commiſſion read. And then the uſher delivereth to the ſteward a white rod, who re-delivereth the ſame to him againe, who holdeth it before the ſteward. Then another oyes is made, and commandement given in the name of the high ſteward of England, to all juſtices and commiſſioners to certifie all indictments and records, &c. Which being delivered into court, the clerk of the crown readeth the return. Another oyes is made, that the lieutenant of the Tower, &c. returne his writ and precept, and to bring the priſoner to the bar; which being done, the clerk reads the retorne. Another oyes is made, that the ſerjeant at armes return his precept with names of the barons and peers by him ſummoned, and the return of that is alſo read. Another oyes is made, that all earles, barons and peers (which by the commandement of the high ſteward be ſummoned)
[29] anſwer to their names, and then they take their places and ſit down, and their names are recorded: and the entry of the record is, that they

they appear, *ad faciendum ea quæ ex parte domini regis eis injungentur.* And when they be all in their places, and the priſoner at the bar, the high ſteward declares to the priſoner the cauſe of their aſſembly, and perſwades him to anſwer without feare, that he ſhall be heard with patience, and that juſtice ſhall be done. Then the clerk of the crown reades the indictment, and proceeds to the arraignment of the priſoner, and if he plead not guilty, the entry is, *et de hoc de bono et malo ponit ſe ſuper pares ſuos, &c.* Then the high ſteward giveth a charge to the peers, exhorting them to try the priſoner indifferently according to their evidence. 1 H. 4. 1.

9. The peers are not ſworn, but are charged, *ſuper fidelitatibus, et ligeantiis domino regi debitis:* for ſo the record ſpeaketh.

10. Then the kings learned councell give evidence, and produce their proofes for the king againſt the priſoner.

11. But the priſoner, when he pleadeth not guilty, whereby he denieth the fact, he needs have no advice of councell to that plea. But if he hath any matter of law to plead, as Humfrey Stafford in 1 H. 7. had, viz. The priviledge of ſanctuary, he ſhall have councell aſſigned to him to plead the ſame, or any other matter in law: as to plead the generall pardon, or a particular pardon, or the like. And after the plea of not guilty, the priſoner can have no councell learned aſſigned to him to anſwer the king's councell learned, nor to defend him. And the reaſon thereof is, not becauſe it concerneth matter of fact, for *ex facto jus oritur:* but the true reaſons of the law in this caſe are: Firſt, that the teſtimonies and the proofs of the offence ought to be ſo clear and manifeſt, as there can be no defence of it. * Secondly, the court ought to be in ſtead of councell for the priſoner, to ſee that nothing be urged againſt him contrary to law and right; nay, any learned man that is preſent may inform the court for the benefit of the priſoner, of any thing that may make the proceedings erroneous. And herein there is no diverſity between the peer and another ſubject. ° And to the end that the triall may be the more indifferent, ſeeing that the ſafety of the priſoner conſiſteth in the indifferency of the court, the judges ought not to deliver their opinions before-hand of any criminall caſe, that may come before them judicially. And we reade, that in the caſe of Humfrey Stafford that arch-traytor, Huſſey chief juſtice, beſought king Henry the ſeventh, that he would not deſire to know their opinions before-hand for Humfrey Stafford, for they thought it ſhould come before them in the kings bench judicially, and then they would do that which of right they ought: and the king accepted of it. And therefore the judges ought not to deliver their opinions before-hand upon a caſe put, and proofs urged of one ſide in abſence of the party accuſed: eſpecially in caſes of high nature, and which deſerve ſo fatall and extreme puniſhment. For how can they be indifferent, who have delivered their opinions before-hand without hearing of the party, when a ſmall addition, or ſubſtraction may alter the caſe: And how doth it ſtand with their oath, who are ſworn, That they ſhould well and lawfully ſerve our lord the king and his people in the office of a juſtice? and they ſhould do equall law, and execution of right to all his ſubjects, &c. See more of this matter in the 13 ſection here following.

In Scotland in all criminall caſes, yea in caſes of high treaſon, *pars rea* may have councell learned.

Vide hereafter upon the ſtatute of 31 Eliz. concerning witneſſes.

*See more hereof cap. 63. Councell learned in Pleas of the Crown.

1 H. 7. fo. 26.

18 E. 3.

12. There be alwayes either all, or ſome of the judges ever atten-

dant upon the high ſteward, and ſit at the feet of the peers, or about a table in the middeſt, or in ſome other convenient place.

13. After all the evidence given for the king, and the priſoners anſwers, and proofs at large, and with patience heard: then is the priſoner withdrawn from the bar to ſome private place under the cuſtody of the lieutenant, &c. And after that he is withdrawn, the lords that are tryers of the priſoner go to ſome place to conſider of their evidence: and if upon debate thereof, they ſhould doubt of any matter, and thereupon ſend to the high ſteward, to have conference with the judges, or with the high ſteward, they ought to have no conference, either with the judges or the high ſteward, but openly in court, and in the preſence, and hearing of the priſoner; as it was reſolved by all the juſtices of England in the reign of king H. 8. in the caſe of the lord Dacres of the North. And this was a juſt reſolution; for when the lords ſhould put a caſe, and aſk advice thereupon, the priſoner ought by law to be preſent, to ſee that the caſe or queſtion be rightly put: and therefore that nothing be done in his abſence, untill they be agreed on their verdict. Hereupon it followeth, that if the peers of the realm, who are intended to be indifferent, can have no conference with the judges, or with the high ſteward in open court in the abſence of the priſoner; *à fortiori*, the king's learned counſell ſhould not in the abſence of the party accuſed, upon any caſe put, or matter ſhewed by them, privately preoccupate the opinion of the judges; and upon ſo juſt a reſolution the caſe ſucceeded well, for the peers found the lord Dacres not guilty.

[30]

Paſch. 26 H. 8. in the caſe of the lord Dacres of the North, reported by juſtice Spilman, which we have ſeen.

14. A noble man cannot waive his triall by his peers, and put himſelfe upon the triall of the country, that is, of twelve freeholders: for the ſtatute of Magna Carta is, that he muſt be tried *per pares*. And ſo it was reſolved in the lord Dacres caſe, *ubi ſupra*.

Mag. Cart. cap. 29.

15. * The peers ought to continue together (as juries in caſe of other ſubjects ought to do) until they be agreed of their verdict: and when they are agreed, they all come again into the court, and take their places, and then the lord high ſteward publicly in open court, beginning with the puiſne lord, (who in the caſe of the lord Dacre was the lord Mordant,) ſaid unto him; My lord Mordant, is William lord Dacre guilty of the treaſons, whereof he hath been indicted or arraigned, or of any of them? And the lord ſtanding up ſaid, Not guilty: and ſo upward of all the other lords *ſeriatim*: who all gave the ſame verdict: In which caſe the entry is, *ſuper quo W. Comes E. & cæteri antedicti pares inſtanter ſuper fidelitatibus & legeantiis dicto domino regi debitis, per præfatum ſeneſcallum ab inferiori pare uſq; ad ſupremum ſeparatim publice examinati dicunt quòd W. dominus Dacre non eſt culp. &c.*

* Reſolved by all the judges. Mich. 13 & 14 El. in the caſe of Tho. duke of Norff. 1 H. 4. fo. 1. 10 E. 4. 6. b. 13 H. 8. fo. 12. Tr. 26 H. 8. Spilman's report.

16. The peers give their verdict in the abſence of the priſoner, and then is the priſoner brought to the bar again: and then doth the lord ſteward acquaint the priſoner with the verdict of his peers, and give judgement accordingly, either of condemnation or acquitall. But it is not ſo in the caſe of another ſubject: for there the verdict is given in his preſence.

17. Every lord of parliament, and that hath voice in parliament, and called thereunto by the king's writ, ſhall not be tried by his peers, but only ſuch as ſit there *ratione nobilitatis*, as dukes, marquiſſes,

Rot. Roman. 17 E. 2. m. 6. Adam Orleton B. of Hereford.

marquiſſes, countes, viſcounts or barons, and not ſuch as are lords of parliament, *ratione baroniarum, quas tenent in jure eccleſiæ*, by reaſon of their baronies which they hold in the right of the church, as arch-biſhops, and biſhops, and in time paſt ſome abbots and priors, but they ſhall be tried by the countrey, that is, by freeholders, for that they are not of the degree of nobility.

2 H. 4. Marks. B. of Carliſle. Stanf. Pl. Coron. li. 3. ca. 62. fo. 153. in Temps H. 8.

18. [a] No noble man ſhall be tried by his peers, but only at the ſuit of the king upon an indictment of high treaſon, or miſpriſion of the ſame, petit treaſon, murder, or other felony, or miſpriſion of the ſame. But in caſe of a premunire or the like, though it be at the ſuit of the king, he ſhall not be tried by his peers, but by freeholders. And ſo in an appeale at the ſuit of the party for petit treaſon, murder, robbery, or other felony, he ſhall be tryed by freeholders. See more hereof in the ſecond part of the Inſtitutes, Magna Carta, cap. 29.

[a] 10 E. 4. 6. b. Mag. Cart. c. 29.

19. [b] And albeit a man be noble, and yet no lord of the parliament of this realm, (as if he be a nobleman of Scotland, or of Ireland, of France, &c.) he ſhall be tried by knights, eſquires, or others of the commons. And ſo it is of the ſonne of a duke, marquiſſe, earle, &c. he is noble, and called lord: and yet becauſe he is no lord of parliament, he ſhall be tried as one under the degree of a peer, and lord of parliament.

[b] 11 E. 3. bre. 473. 8 R. 2. proces. pl. ultimo. 20 E. 4. 6. 20 El. Dier, 360. 38 H. 8. Br. treaſon. Seignior Sancras caſe. Lib. 9. fo. 117.

20. No peer of the realm, or any other ſubject ſhall be convicted by verdict, but the ſaid offences muſt be found by above four and twenty, viz. by twelve, or above, at his indictment, or by twelve peers, or above, if he be noble, and by twelve, and not above, if he be under the degree of nobility.

[31]

21. A peer of the realme being indicted of treaſon, or felony, or of miſpriſion, as is aforeſaid, and duly tranſmitted to the lords, may be arraigned thereof in the upper houſe of parliament, as frequently in parliament rolls it doth appeare: but then there muſt be appointed a ſteward of England, who ſhall put him to anſwer: and if he plead not guilty, he ſhall be tried *per pares ſuos*, and then the lords ſpiritual muſt withdraw, and make their proxies: but no appeal of treaſon can be in parliament, [a] but is ouſted by the ſtatute of 1. H. 4. cap. 14.

10 E. 4. 6. Rot. par. 21. R. 2. Countee de Arundels caſe. Rot. Parliam. 5 H. 4. nu. 11, 12. 31 H. 6. nu. 49. Countee de Devons caſe. 28 H. 6. nu. 19. Duke of Suff.

[a] 1 H. 4. cap. 14.

22. [b] And as the beginning (viz. the finding of the indictment by freeholders) is equall to them both: ſo the moſt extreme and heavy judgement, if they be found guilty, is equal to both, &c. which you may reade in the firſt part of the Inſtitutes, Sect. 147.

[b] 1 H. 4. 1. Stanf. Pl. Coron. 182. E. K. See hereafter. cap. Judgement and Execution.

23. [c] And though the commiſſion of the lord ſteward be only in theſe latter times *hac vice*, yet may the ſame be adjourned, as other commiſſioners *hac vice* may. And ſo it was holden in the lord Dacres caſe. And ſo it was done by the ſteward of England in the caſe of R. earle of S. and of F. his wife, who adjourned his commiſſion until the next day.

[c] Paſch. 26 H. 8. ubi ſupra. L. 5 E. 4. 33. 12 H. 4. 20.

24. If execution be not done according to the judgement, then the high ſteward in the caſe of a peer of the realm, or the court or commiſſioners in caſe of another ſubject, may by their precepts under their ſeales command execution to be done according to the judgement: but in caſe of high treaſon, if all the reſt of the judgement (ſaving the beheading, which is part of the judgement) be pardoned, this ought to be under the great ſeale of England.

25. And when the ſervice is perſormed, then is an oyes made for the diſſolving of the commiſſion; and then is the white rod, which hath been borne and holden before the ſteward, by him taken in both his hands, and broken over his head.

Laſtly, the indictments together with the record of the arraignment, triall, and judgement, ſhall be delivered into the king's bench, there to be kept and inrolled.

Hitherto we have ſpoken when a noble man doth appear, and plead not guilty, and put himſelf upon his peers: Now let us ſee what ſhall be had againſt him when he is indicted and appears not, and cannot be taken: and generally he ſhall be outlawed, *per judicium coronatorum*. But how doth that ſtand with Magna Charta, *nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum?* That is to be intended, when he appears and pleads not guilty, and puts himſelf upon his peers: but when he abſents himſelf, and will not yeild himſelf to the due tryall of his peers, then he ſhall be outlawed *per judicium coronatorum*, or elſe he ſhould take advantage of his own contumacy, and flying from judgement. [d] For proces to be awarded upon the indictment or appeal of treaſon, felony, or treſpaſs, either againſt a nobleman or any other, ſee the ſtatute of 6 H. 6. and 8 H. 6. and if the proces and order preſcribed by thoſe ſtatutes be not purſued, the outlawry may be reverſed by writ of error, which writ ought to be granted to him *ex merito juſtitiæ*, as it was adjudged in Ninian Menvils caſe: and thoſe ſtatutes doe extend as well to the kings bench, as to other courts having by commiſſion power to hear and determine the ſame, and very few outlawries of treaſon or felony, are of force and validity in law, for that theſe acts are not purſued.

And theſe acts are well expounded by our * books, and therefore they ſhall not need to be recited at large. This is neceſſary to be added, that the opinion of Stanf. Pl. Cor. 182. l. upon the ſtatute of 33 H. 8. c. 20. is, where the attainder is not erroneous, but lawfull by the courſe of the law: and ſo it was reſolved, Tr. 28 Eliz. and thereupon [e] the ſtatute of 28 Eliz. ca. 2. was made, that no attainder that then was for any high treaſon ſhould be reverſed for error where the party was executed. But that act extendeth only to attainders before that act, and where the party attainted ſuffered pains of death, as hath been ſaid.

[32]

But admitting the proces be awarded according to theſe ſtatutes, and the truth is, that the party indicted of high treaſon (be he noble or other) at the time of the outlawry pronounced, is out of the realm, &c. whether may he avoid the ſame by writ of error? The anſwer is, that he might have avoided the ſame by writ of error at the common law: but now in caſe of high treaſon he is barred of his writ of error by the ſtatutes of 26 H. 8. and 5 E. 6. which ſtatutes are expounded to extend generally to all treaſons, but thoſe ſtatutes extend not to any other offence than high treaſon only, and therefore all other offences remain as they did at the common law for that point.

Now for that all indictments for any offence whatſoever, as well of noblemen, as of any under the degree of nobility, ought by the common law of the realm to be by perſons duly returned, and by * lawfull liege people, indifferent as they ſtand unſworn, and without any denomination of any: a good and profitable law

was

Mag. Cart. ca. 29.

[d] See hereafter in the chapter of Judgement and Execution concerning reverſing of outlawries. 6 H. 6. c. 1. 8 H. 6. ca. 10. Mich 26 and 27 Eliz. in bre. de error coram Rege in Ninian Menvills caſe. Utlary de haut treaſon reverſe in bank le roy.

* 19 H. 6. fo. 1. 2. 11 H. 6. 54. 1 E. 4. 1. 30 H. 6. proces. 192 31 H. 6. 11. Vide F. N. B. 115. l. Li. Intr. R. f. 122. Stanf. Pl. cor. 63, 69. 182 l.

[e] 28 El. ca. 2.

See the firſt part of the Inſti. ſect. 26 H. 8. cap. 13. 5 E. 6. cap. 11. 12 El. Dier 287.

* Artic. ſup. cart. cap. 9. 28 E. 1. 20 E. 3. cap. 6. 34 E. 3. c. 4. 42 E. 3. c. 11. Regiſt. 178. Ruſt. pl. 117.

* was made in that behalf at the parliament holden 11 H. 4. in theſe words. *Item* becauſe that now of late [a] inqueſts were taken at Weſtm' of perſons named to the [b] juſtices, without due return of the ſherif, of which perſons ſome were [c] outlawed before the ſaid juſtices of record, and ſome fled to ſanctuary for treaſon, and ſome for felony, there to have refuge; by whom as well many offenders were indicted, as other lawfull liege people of our lord the king, not guilty by conſpiracy, abetment, and falſe imagination of other perſons for their ſpeciall advantage and ſingular lucre, againſt the courſe of the common law uſed and accuſtomed before this time. Our ſaid lord the king for the greater eaſe and quietneſſe of his people, will and granteth, that the ſame indictment ſo made, with all the dependance thereof be [d] revoked, adnulled, void, and holden for none for ever. And that from henceforth no indictment be made by any ſuch perſons, but by enqueſt of the king's lawful [e] liege people, in the manner, as was uſed in the time of his noble progenitors, returned by the ſherifs, or baylifs of franchiſes, without any [f] denomination to the ſherifs, or baylifs of franchiſes before made by any perſon of the names, which by him ſhould be impanelled, except it be by the officers of the ſaid ſherifs or baylifs of franchiſes ſworn and known to make the ſame, [g] and other officers to whom it pertaineth to make the ſame according to the law of England. And if any indictment be made hereafter in any point to the contrary, that the ſame indictment be alſo void, revoked, and for ever holden for none.

* 11 H. 4. ca. 9.
a Staſf. pl. cor. 87. e.
b Rot Parl. 11. H. 4. nu. 15. in the kings bench.
c Vid. 11 H. 4. fo. 41. 21 H. 6. 30. 9 E. 4. 16. 3 H. 6. 55. 26 Aſſ. 28.
d 11 H. 4. 41.
e 14 H. 4. 19.
f 21 E. 3. 5. 15 E 3. chal. 113. 27 Aſſ. pa. 65. 28 Aſſ. 24. 22. 49 E 3. 1. 49 Aſſ. 1. 28. 43 E. 3. chall. 94. 6 R 2. chall. 102. 7 H. 4 10. 21 E. 4. 74. 19 H. 6. 9. 21 H. 6. 22. 14 H. 7. 1.
g Nota.

The body of this act conſiſteth upon two diſtinct purviens or branches, the one to remedy a miſchief paſt, the other to provide for the time to come. The firſt branch conſiſteth of a preamble, and a purvien: and the preamble containeth theſe eight parts. Firſt, it ſheweth divers inqueſts had been taken at Weſtminſter by perſons named to the juſtices. Secondly, without due return of the ſherif. Thirdly, of which ſome were outlawed before the ſaid juſtices of record. Fourthly, ſome fled to ſanctuary for treaſon, and ſome for felony. Fifthly, by whom many offenders were indicted. Sixthly, ſome not guilty. Seventhly, by conſpiracy, &c. Eighthly, that all this was againſt the courſe of the common law. By the body of the act, it is enacted that the ſame indictment, with all the dependance thereof, be revoked, and made void. Then followeth the ſecond branch or purvien for the time to come, and this purvien conſiſteth of divers parts: Firſt, in deſcribing by what perſons indictments ought to be found, and therein 1. *privativè*, that is, not by any ſuch perſons, having reference to the preamble, which perſons we have before particularly diſtinguiſhed. 2. *Poſitivè*, that all indictments muſt be found by perſons of theſe qualities. 1. They muſt be the kings lawfull liege people. 2. Returned by ſherifs, or baylifs of franchiſes, and other officers to whom it pertaineth. 3. Without any denomination to the ſherifs, baylifs, or other officers: and this purvien is in affirmance, and declaratory of the common law.

The ſecond part of the purvien is introductory of a new law, viz. that if any indictment be made hereafter in any point to the contrary, that the ſame indictment be void, revoked, and holden for none. Wherein theſe two things are to be obſerved: 1. That this is a generall law, and extendeth to all indictments for any crime, de-

fault, or offence whatſoever: for the words be [if any indictment] generally without naming of any court, or before whom. 2. If the indictment be found by any perſons that are outlawed, or not the kings lawfull liege people, or not lawfully returned, or denominated by any, viz. by all or any of theſe, that then the indictment is void, for the words be, [if any indictment be made hereafter in any point to the contrary, &c.] Upon this ſtatute in the caſe of Robert Scarlet before the juſtices of aſſize at Bury in the county of Suffolk, in ſommer vacation, 10 Ja. R. theſe points were reſolved and adjudged: Firſt, where at the ſeſſions of the peace holden at Woodbridge in the ſaid county of Suffolk, Robert Scarlet by confederacy between him and the clerk, that was to read the pannell of the grand jury returned by the ſherif, (whereof he was none, albeit he laboured the ſherif to have returned him) that the clerk ſhould read him as one of the pannell, which was done accordingly, and he ſworn. It was reſolved and adjudged that this caſe was within the ſtatute, for that he was not returned by the ſherif. Secondly, that where the reſt of the great inqueſt giving faith to him indicted ſeventeen honeſt and good men upon divers penall ſtatutes, which was done by the ſaid Robert Scarlet maliciouſly. It was reſolved and adjudged, that albeit he * alone was ſworn without the return of the ſherif, and all the reſt duly returned, yet this caſe was within this ſtatute, and all the indictments found by him and the reſt were void by this ſtatute: for hereby it appeared what miſchief ſuch a one might doe. Thirdly, that Robert Scarlet upon this caſe had offended againſt the ſaid act, and might be indicted thereupon: and accordingly he was upon ſufficient proof of the fact, as aforeſaid, indicted upon the ſaid act, and pleaded not guilty, and was found guilty. Fourthly, that this act extended not only to inditments of treaſon and felony, but of all other offences and defaults whatſoever, according to the generality of the words. Fifthly, conſideration was had of the act of 3 H. 8. cap. 12. and reſolved clearly that this ſtatute had not altered the act of 11 H. 4. in any thing concerning the offence of Scarlet, as upon that, which ſhall be ſaid of the act of 3 H. 8. ſhall appear. And upon hearing of councell learned what they could ſay in arreſt of judgement, at laſt judgement was given, that he ſhould be fined and impriſoned, and ordered by the court that no proces ſhould goe out upon the ſaid indictments found by the ſaid great inqueſt, whereof Scarlet was one.

* 47 E. 3. 1. 7 H. 4. 10. 21 E. 4. 74.

3 H. 8. ca. 12.

But notwithſtanding this good law, through the ſubtilty, and untrue demeanor of ſherifs, and their miniſters, great extortions and oppreſſions be and have been committed and done to many of the kings ſubjects by means of returning at ſeſſions holden within counties and ſhires for the body of the ſhire, the names of ſuch perſons as for the ſingular advantage, &c. of the ſaid ſherifs and their miniſters, will be wilfully forſworn and perjured by the miniſter labour of the ſaid ſherifs and their miniſters, by reaſon whereof many ſubſtantial perſons, the king's true ſubjects have been wrongfully indicted of murders, felonies, and miſdemeanours: and ſometime by labour of the ſaid ſherifs and their miniſters, divers great felonies and murders have been concealed, &c. For remedy of which miſchiefs it is enacted by the ſaid ſtatute of 3 H. 8. cap. 12. That the juſtices of gaol delivery, or juſtices of peace, whereof

whereof one to be of the quorum, in their open ſeſſions may reform the panell returned by the ſherif to inquire for the king, by putting to and taking out the names of the perſons ſo impanelled by the diſcretion of the ſaid juſtices, &c. and that the ſherif ſhall return the panells ſo reformed. This act extends only to juſtices of gaol delivery, and of the peace: the body of the act for offences is generall and evident. *Vide* 11 H. 7. cap. 24. Vid. 11. H. 7. ca. 24.

Nota Lector, that the aforeſaid parliament of 11 H. 4. begun in *quindena Hillarii*, anno 11 H. 4. and the ſame tearm, viz. Hil. 11 H. 4. fo. 41. it was according to the ſaid act of 11 H. 4. reſolved by Gaicoign chief juſtice, and all the reſt of the juſtices, that an indictment of felony found by an inqueſt before 5 H. 4. whereof one was outlawed of felony, and another was acquitted by the generall pardon, ſo as they were not *probi et legales homines* to enquire as the law willeth, and after the party had pleaded not guilty to the felony, it was awarded, that all the indictments by them found, were adnulled and made void. Herewith agreeth Stanford in his pleas of the crown, fo. 87. and 88. Vide F. tit. Indictment 25. and Coron. 89. and Brook tit. Indictment 2. Note the act ſaith, that they were outlawed before themſelves, ſo as the court may take knowledge thereof of themſelves, or of any other, as *amicus curiæ*: but the ſafeſt way for the party indicted is to plead, upon his arraignment, the ſpeciall matter given unto him by the ſtatute of 11 H. 4. for the overthrow of the indictment, with ſuch averments, as by law are required, (agreeable to the opinion of the Lord Brook. *Ubi ſupra.*) and to plead over to the felony, and to require councell learned for the pleading thereof, which ought to be granted, and alſo to require a copy of ſo much of the indictment, as ſhall be neceſſary for the framing of his plea, which alſo ought to be granted. And theſe laws made for indifferency of indicters, ought to be conſtrued favourably, for that the indictment is commonly found in the abſence of the party, and yet it is the foundation of all the reſt of the proceeding. Hil. 11 H. 4. f. 41. [34] Stanf. Pl. cor. 87, 88. F. tit. Indictment 25. and Coron. 89. Br. tit. indict. 2. Vid. le ſtatutes de 1 R. 3. ca. 4. 33 H. 6. c. 2. W. 2. ca. 13. 1 E. 3. ſtat. 2. ca. 17. All tending that indictments may be duly had. Dier 3 Mar. 131, 132. Stanf. pl. cor. 90. 35 H. 8. ca. 2.

To draw to an end concerning tryals: it is regularly true, that by the common law the tryall ſhall be in the county, where the indictment is taken: and by the aforeſaid act of 35 H. 8. treaſons and miſpriſions of treaſons committed or done out of the realm, &c. ſhall be enquired of, heard, and determined before the juſtices of the king's bench, &c. Now the caſe fel out upon this ſtatute to be thus: * one was indicted before the juſtices of the kings bench, at the tearm holden at Hertford, by a jury of the county of Hertford, for divers high treaſons committed out of this realm, and after the tearm was adjourned to Weſtm. in the county of Midd. The queſtion was, by which of the counties the party indicted ſhould be tried: and it was reſolved, that he ſhould be tried by men of that county where the indictment was taken. But otherwiſe it is upon the ſtatute of 5 El. ca. 1. the caſe being, that Horn biſhop of Winch. tendred to Edmond Bonner late biſhop of London, in the county of Surrey, within his dioces the oath of ſupremacy according to the act 1 Eliz. which Bonner refuſed, and this was certified by the biſhop of Winch. into the kings bench, then ſitting at Weſtminſter in the county of Midd. Now, by the ſtatute of 5 El. he that refuſeth the oath is to be indicted of a premunire by a jury of Midd. as a jury of that county might doe for any offence done in that * Mich. 35 & 36 El. in the caſe of Francis Dacres. 5 El. cap. 1. Mich. 6 & 7 El. Dier fo. 234. Bonner's caſe.

that county, and extendeth only to the indictment, where the words of the act of 35 H. 8. be, [ſhal be enquired of, heard, and determined,] the queſtion upon the ſtatute of 5 Eliz. was, if Bonner ſhould appear and plead not guilty, by what county he ſhould be tried, whether by a jury of Midd. where the indictment was, or by a jury of Surrey, where the offence was committed; and reſolved that he ſhould be tried by a jury of Surrey: for the ſtatute of 5 El. extendeth to the indictment only, and leaveth the triall to the common law, which appointeth the tryall to be, where the offence is committed, and ſo a manifeſt diverſity between the two caſes: for regularly by the common law in all pleas of the crown, *debet quis juri ſubjacere, ubi deliquit.*

Bract. lib. 3. fo. 154. b. *Vincula qui ſenſit, didicit ſuccurrere vinctis.*

It is now neceſſary to be known, how priſoners (to ſpeak once for all) committed for treaſon, or any other offence ought to be demeaned in priſon. Bracton ſaith, *ſolent præſides in carcere continendos damnare, ut in vinculis contineantur, ſed hujuſmodi interdicta ſunt à lege, quia carcer ad continendos, non ad puniendos haberi debeat:* And in another place he ſaith, *Cum autem taliter captus coram juſtic. eſt producendus, produci non debet ligatis manibus, (quamvis interdum geſtans compedes propter evaſionis periculum,) et hoc ideo, ne videatur coactus ad aliquam purgationem ſuſcipiendam.*

Bract. lib. 3. fo. 105. a. Stanford 78. Bract. li. 3. f. 137. Note Shackells about the feet ought not to be, but for fear of eſcape. Mirror, c. 2. §. 9.

[a] If felons come in judgement to anſwer, &c. they ſhall be out of irons, and all manner of bonds, ſo that their pain ſhall not take away any manner of reaſon, nor them conſtrain to anſwer, but at their free will. [b] And in another place he ſaith, and of priſoners we will that none ſhall be put in irons, but thoſe †, which ſhall be taken for felony, or treſpaſs in parks or vivaries, or which be found in arerages upon account, and we defend that otherwiſe they ſhall not be puniſhed nor tormented. [c] *Omnes autem attachiabiles licet vicecomiti in priſona cuſtodire, &c. non tamen ad puniend', ſed ad cuſtodiend', &c.* [d] It is an abuſe that priſoners be charged with irons, or put to any pain before they be attainted.

[a] Brit. c. 5. fo. 14. [b] Cap. 11. fo. 17. W. 2. c. 1. after judgement. Lib. 3. fo. 44. Lib. 8. fo. 100. 24 H. 8. Dier. 249. Pl. Com. 360. a. [c] Fleta li. 1. ca. 26. [d] Mirror c. 5. §. 1.

[e] *Quidam ſacerdos arraniatus de felonia poſuit ſe ſuper patriam, & ſtetit ad barram in ferris, ſed per præceptum juſtic. liberatur à ferris.* And there is no difference in law, as to a prieſt and a lay man, as to irons.

[e] 8 E. 2. cor. 432.

[f] *Preſentat quod ubi quidam Robertus Bayhens de Taneſby captus fuit, & in priſona caſtri Lincoln detentus pro quodam debito ſtatut. mercatorii in cuſtodia Tho. Boteler conſtabularii caſtride Lincoln ibi præd. Tho. le Botcler poſuit ipſum Robertum in profundo gaole inter lenones in vili priſona contra * forman ſtatut. &c. et eodem profundo detinuit, quouſque idem Robertus fecit finem cum eo de 40 s. quos ei ſolvit per extorſionem.*

[f] Tr. 7 E. 3. coram rege Rot. 44.

† [35]

* 1 E. 3. c. 7.

So as hereby it appeareth, that where the law requireth that a priſoner ſhould be kept in *ſalva & arcta cuſtodia*, yet that that muſt be without pain or torment to the priſoner.

Torture, the rack, &c.

Hereupon two queſtions do ariſe, when and by whom the rack or brake in the Tower was brought in.

Rot. Par. 26 H. 6. Rot. Parl. 28 H. 6. nu. 30.

To the firſt, John Holland earl of Huntingdon, was by king H. 6. created duke of Exeter, and anno 26 H. 6. the king granted to him the office of the conſtableſhip of the Tower; he and William de la Poole duke of Suffolk, and others, intended to have brought in the civill lawes. For a beginning whereof, the duke of Exeter being conſtable of the Tower firſt brought into the Tower

the

the rack or brake allowed in many caſes by the civil law: and thereupon the rack is called the duke of Exeter's daughter, becauſe he firſt brought it thither.

Hollenſhed. pa. 670. &c.

To the ſecond upon this occaſion, Sir John Forteſcue chiefe juſtice of England, wrote his book in commendation of the lawes of England, and therein preferreth the ſame for the government of this countrey before the civill law; and particularly that all tortures and torments of parties accuſed were directly againſt the common lawes of England, and ſhewed the inconvenience thereof by fearfull example, to whom I refer you being worthy your reading. So as there is no law to warrant tortures in this land, nor can they be juſtified by any preſcription being ſo lately brought in.

Innocentem cogit mentiri dolor. Forteſcue. ca. 22. fo. 24.

And the poet in deſcribing the iniquity of Radamanthus, that cruell judge of hell, ſaith,

Caſtigatque, auditque dolos, ſubigitque fateri.

Virgil.

Firſt, he puniſhed before he heard, and when he had heard his deniall, he compelled the party accuſed by torture to confeſſe it. But far otherwiſe doth Almighty God proceed *poſtquam reus diffamatus eſt.* 1. *Vocat.* 2. *Interrogat.* 3. *Judicat.* To conclude this point, it is againſt Magna Carta, cap. 29. *Nullus liber homo, &c. aliquo modo deſtruatur, nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum, aut per legem terræ.* And accordingly all the ſaid ancient authors are againſt any paine, or torment to be put or inflicted upon the priſoner before attainder, nor after attainder, but according to the judgement. And there is no one opinion in our books, or judiciall record (that we have ſeen and remember) for the maintenance of tortures or torments, &c.

Luke 16. 1, 2. &c. John 7. 51. Nunquid lex noſtra judicat hominem niſi prius audierit ab ipſo?

And now, to conclude this chapter of treaſon. It appeareth in the holy ſcripture, that traytors never proſpered, what good ſoever they pretended, but were moſt ſeverely and exemplarily puniſhed: As [a] Corah, Dathan, and Abiram, by miracle: *dirupta eſt terra ſub pedibus eorum, et aperiens os ſuum devoravit illos, &c.* [b] Athalia the daughter of Amri, *interfecta eſt gladio.* [c] Bagatha and Thara againſt Aſſuerus, *appenſus eſt uterq; eorum in patibula.* [d] Abſolon againſt David. *Suſpenſus in arbore, et Joab infixit tres lanceas in corde ejus.* [e] Achitophel with Abſolon againſt David. *Suſpendio interiit,* he hanged himſelfe. [f] Abiathar the traiterous high prieſt againſt Solomon. *Abiathar ſacerdoti dixit rex, &c. Et quidem vir mortis es, ſed hodie te non interficiam, &c. Ejecit ergo Solomon Abiathar, ut non eſſet ſacerdos.* [g] Shemei againſt David, *gladio interfectus.* [h] Zimri againſt Ela, who burnt himſelfe. [i] Theudas *(qui occiſus eſt, et circiter* 400 *qui credebant ei, diſperſi ſunt et redacti ad nihilum)* and Judas Galilæus, *ipſe periit, et omnes quotquot conſenſerunt ei, diſperſi ſunt.* Laſtly, [k] Judas Iſcariot, *ſecundum nomen ejus vir occiſionis,* the traytor of traytors. *Et hic quidem poſſedit agrum de mercede iniquitatis ſuæ, & ſuſpenſus crepuit medius, et diffuſa ſunt omnia viſcera ejus.*[l]

Proditor illudit verbis, dum verbera cudit.

[a] Numb. 16. 31, 32. & 27. 3.
[b] 2 Regum, 11. 16.
[c] Eſth. 12. 2,3.
[d] 2 Sam. 18. 9. 14.
[e] 2 Sam. 17. 23.

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[f] 1 Reg. 2. 26, 27.
[g] 2. Sam. 16. 5, 6. 1 Reg. 2. 8. &c. 46.
[h] 1 Regum 16. 9. &c. 18.
[i] Act. Apoſt. 5. 36, 37.
[k] Act. Apoſt. 1. 18. Math. 27. 5. laqueo ſe ſuſpendit. *Qui molitur inſidias in patriam, id facit quod inſanus nauta perforans navem in qua ipſe vehitur.*
[l] *Felix quem faciunt aliena pericula cautum.* Prov. 24. 21.

Peruſe over all our books, records, and hiſtories, and you ſhall finde a principle in law, a rule in reaſon, and a trial in experience, that treaſon doth ever produce fatal and final deſtruction to the offender, and never attaineth to the deſired end, (two incidents inſeparable thereunto.) * And therefore let all men abandon it, as the moſt poiſonous bait of the devill of Hell, and follow the precept in holy

holy ſcripture, Fear God, honour the king, and have no company with the ſedicious.

See more of treaſon in the next chapter of Miſpriſion, &c. and in Principall and Acceſſory, in the title of Judgement and Execution: and the chapter of *Monomachia*, Single Combat, &c. the reſidue of this act of 25 E. 3.

CAP. III.

OF MISPRISION OF TREASON.

Miſpriſio proditionis.

See Bract. lib. 3. fo. 118. b. & 119. a.

MISPRISIO commeth of the French word *meſpris* which properly ſignifieth neglect or contempt: for [*mes*] in compoſition in the French ſignifieth *mal* as *mis* doth in the Engliſh tongue: as miſchance, for an ill chance, and ſo *meſpriſe* is ill apprehended or known. In legall underſtanding it ſignifieth, when one knoweth of any treaſon or felony, and concealeth it, this is miſpriſion, ſo called, becauſe the knowledge of it is an ill knowledge to him, in reſpect of the ſevere puniſhment for not revealing of it: for in caſe of miſpriſion of high treaſon he is to be impriſoned during his life, to forfeit all his goods, debts, and duties for ever, and the profits of his lands during his life: and in caſe of felony, to be fined and impriſoned. And in this ſenſe doth the ſaid ſtatute of 1 & 2 Ph. and Mar. ſpeak, when it ſaith, Be it declared, and enacted, by the authority aforeſaid, that concealement or keeping ſecret of any high treaſon be deemed and taken only miſpriſion of treaſon, and the offenders therein to forfeit and ſuffer, as in caſes of miſpriſion of treaſon hath heretofore been uſed. * But by the common law concealment of high treaſon was treaſon, as it appeareth in the caſe of the lord Scrope, an. 3 H. 5. and by Bracton, lib. 3. fo. 118. b. and 119 a.

See hereafter ca. 65. of miſpriſions, &c.
See hereafter in Theftbote, ca. 61. 1 & 2 Ph. & Mar. Ubi ſupra.
See 1 E. 6. c. 12. and 1 El. ca. 6.
25 H. 8. ca. 12.

* Hil. 14. El. cited by the lo. Dier in the lo. Lumley's caſe. MS.

[a] It is miſpriſion of high treaſon, for forging of money, which neither is the money of this realme of England, nor currant within the ſame.

[a] 14 El. ca. 3.

[b] Miſpriſion of high treaſon in concealing of a bull, &c. See the ſtatute.

[b] 13 El. ca. 2.

[c] It is ſaid in 2 R. 3. that every treaſon or felony includeth in it a miſpriſion of treaſon or felony. Therefore if any man knoweth of any high treaſon, he ought with as much ſpeed as conveniently he may to reveale the ſame to the king, or ſome of his privie councell, or any other magiſtrate. And miſpriſion in a large ſenſe is taken for many great offences which are neither treaſon nor felony, whereof we ſhall ſpeak more hereafter, being in this place reſtrained to miſpriſion of treaſon.

[c] 2 R. 3. fo. 9. Stanf. 57. c.

See John Coniers caſe, Dier 296. That the receiving of one that hath counterfeited the king's coine, and comforting of him knowing him to have counterfeited the king's coine, is but miſpriſion.

See more of Miſpriſion of Treaſon in the chapters of High Treaſon, and of Principall and Acceſſory.

CAP.

CAP. IV.

Felony by compaſſing or conſpiring to kill the King, or any Lord, or other of the King's Counſell.

NEXT hereunto we have thought good to ſpeak of the ſtatute of 3 H. 7. the letter of which law enſueth. 3 H. 7. cap. 14.

Item, FORASMUCH as by quarrels made to ſuch as have been in great authority, office, and of counſell with kings of this realme, hath enſued the deſtruction of kings, and the undoing of this realme; ſo as it hath appeared evidently, when compaſſing of the death of ſuch as were of the kings true ſubjects was had, the deſtruction of the prince was imagined thereby: and for the moſt part it hath growne, and been occaſioned by envie, and malice of the kings own houſhold-ſervants; as now of late ſuch a thing was likely to have enſued: * and for ſo much as by the law of this land, if actuall deeds be not had, there is no remedy for ſuch falſe compaſſings, imaginations, and confederacies had againſt any lord, or any of the kings counſell, or any of the kings great officers in his houſhold, as ſteward, treaſurer, and comptroller: and ſo great inconveniencies might enſue, if ſuch ungodly demeaning ſhould not be ſtraitly puniſhed before that actuall deed were done. Therefore it is ordained by the king, the lords ſpirituall and temporall, and the commons of the ſaid parliament aſſembled, and by authority of the ſame, That from hence forward, the ſteward, treaſurer, and comptroller of the kings houſe for the time being, or one of them, have full authority and power to enquire by twelve ſad men, and diſcreet perſons of the chequer roll of the Kings honourable houſhold, if any ſervant admitted to be his ſervant ſworne, and his name put into the chequer roll of his houſhold, whatſoever he be, ſerving in any manner, office, or roome, reputed, had and taken, under the ſtate of a lord, make any confederacies, compaſſings, conſpiracies, or imaginations with any perſon or perſons, to deſtroy or murder the king, or any lord of this realme, or any other perſon ſworne to the kings counſell, ſteward, treaſurer, or comptroller of the kings houſe; that if it be found before the ſaid ſteward for the time being, by the ſaid twelve ſad men, that any ſuch of the kings ſervants as is aboveſaid, hath confederated, compaſſed, conſpired, or imagined, as is aboveſaid, that he ſo found by that inquiry, be put thereupon to anſwer. And the ſteward, treaſurer, and comptroller, or two of them have power to determine

* Nota.

termine the ſame matter according to the law. And if he put him in triall, that then it be tried by other twelve ſad men of the ſame houſhold: and that ſuch miſdoers have no challenge, but for malice. And if ſuch miſdoers be found guilty by confeſſion, or otherwiſe, that the ſaid offence be judged felony, and they to have judgement and execution as felons attainted ought to have by the common law.

[38] This act divideth itſelf into two generall parts, viz. the preamble, and the body of the act. In the preamble three things are to be obſerved.

1. That by quarrels made to ſuch, as are in great authority, office, and of counſell with the kings of the realm, have enſued the deſtruction of the kings, and the undoing of the realm, as in the records of parliament, and hiſtories of king E. 2. R. 2. king H. 6. &c. you may read. And as king William Rufus was ſlain in the new foreſt by the glance of an arrow, ſo the overthrow of the king, &c. hath followed by glances, and conſequents, when the tow of deſtruction hath been aimed at the overthrow of thoſe, who were in great authority neer about, and dear to the king, not daring in direct manner to aim at the king himſelf. Therefore, the firſt concluſion is, that when the compaſſing of the death of ſuch, as were of the king's true ſubjects was had, the deſtruction of the prince was imagined thereby.

2. That for the moſt part, it hath grown by envy and malice by the king's own houſhold ſervants: and the reaſon thereof is, for that they being of the kings houſhold, have greater and readier means either by night, or by day to deſtroy ſuch as be of great authority, and neer about the king: and ſuch an attempt and conſpiracy was before this parliament made by ſome of this kings houſhold ſervants, and great miſchief was like thereupon to have enſued, which was the cauſe of the making of this act.

See before in the chapt. of High Treaſon. Verb. Overt Act.

3. The concluſion of the preamble is, that by the law of the land, if actuall deeds be not had, there is no remedy for ſuch falſe compaſſings, &c. This is a true declaration: for the bare conſpiracy of the death of any lord or other of the king's councell, or of the ſteward, treaſurer, or comptroller, unleſſe they had been ſlain indeed, was no felony before this act, and ſo reſolved upon the contempt and conſpiracy aforeſaid.

In the body of this act, ſix things are enacted. Firſt, that the offender muſt have three qualities. 1. He muſt be the kings ſervant ſworn. 2. His name muſt be put in the cheque roll of the kings houſhold. 3. He muſt be under the ſtate of a lord: and if he conſpire with any other, that is not of the kings houſhold, yet is the conſpiracy within this act, but he of the king's houſhold is only the felon within the purvien of this ſtatute, as it appeareth by the words of the ſtatute.

Secondly, againſt what perſons the offence made felony by this act is to be committed: and in number they be four. 1. To deſtroy or murder the king. By this act it expreſsly appeareth by the judgement of the whole parliament, that beſides the confederacy, compaſſing, conſpiracy, or imagination, there muſt be ſome other overt act or deed tending thereunto, to make it treaſon within the ſtatute of 25 E. 3. And therefore the bare confederacy, compaſſing,

See before in the chapt. of high treaſon, Ubi ſup.

† conſpiracy,

conſpiracy, or imaginations by words only, is made felony by this act. But if the conſpirators doe provide any weapon, or other thing, to accompliſh their deviliſh intent; this and the like is an overt act to make it treaſon. 2. Any lord of this realme being ſworn of the kings councell: for by the purvien of this act, he muſt be alſo of the kings councell: this is underſtood of the kings privy councell, and ſo throughout the act. 3. Any other of the kings councell (that is, the kings privy councell) being under the degree of a lord. 4. The ſteward, treaſurer, and comptroller of the kings houſhold, being great officers, though they be not of the king's councell.

Thirdly, the third generall part expreſſeth the perſons to whom power is given to enquire and determine this felony. The ſteward, treaſurer, and comptroller, or any one of them may enquire. And they or two of them have power by this act to hear and determine the ſame: and though the words be for the inquiry, that they three, or any of them, &c. yet an indictment taken before two of them is good, becauſe it is for advancement of juſtice. And this act is in nature of a commiſſion to them, for other commiſſion they need not to have: and this you may ſee in divers other acts of parliament of like nature. If any the houſhold ſervants conſpire the death of the ſteward, treaſurer, and comptroller, yet by force of this act they are judges of the cauſe, and none other can be, and in that caſe, they will aſſiſt themſelves for their direction, with ſome grave and learned men in the laws. But if the death of any one of them be compaſſed, then it is more convenient that it be heard and determined before the other two.

18 E. 3. 1. 23 Aſſ. 17. 27 H. 6. 8. 27 H. 8. 13.

[39]

Fourthly, the fourth part ſetteth forth, firſt, how the inquiry, and after, the trial ſhall be made, that is, that the inquiry muſt be made by twelve ſad men and diſcreet perſons of the cheque roll of the kings houſhold: and when the offender hath pleaded not guilty, the tryall ſhall be by the like perſons. And here though this act limiteth the inquiry to be by twelve, yet if it be inquired of by more than twelve, the preſentment is good, but the tryall muſt be by twelve only.

Fifthly, no challenge ſhall be made, but for malice.

Sixthly, by the context of the whole act, the conſpiracy, that is to be heard and determined by this act, muſt be plotted to be done within the kings houſhold.

Vide lib. Plac. Coke fo. 482.

The offender againſt this ſtatute ſhall have the benefit of his clergy; for whenſoever felony is made by any ſtatute, and the benefit of clergy is not expreſsly taken away, the offender ſhall have his clergy.

See the ſtatute of 3 & 4 E. 6. whereby amongſt other things in ſome caſe it was high treaſon, and in ſome caſe felony, to intend, or goe about to kill, or impriſon any of the kings privy councell, &c. from which felony, the benefit of ſanctuary, and clergy was taken away: but theſe treaſons and felonies are repealed by the ſtatute of 1 Mar.

3 & 4 E. 6. ca. 5.

CAP.

CAP. V.

OF HERESIE.

CONCERNING hereſie five things fall into conſideration. Firſt, who be the judges of hereſie. Secondly, what ſhall be adjudged hereſie. Thirdly, what is the judgement upon a man convicted of hereſie. Fourthly, what the law alloweth him to ſave his life. Fifthly, what he ſhall forfeit by judgement againſt him.

Touching the firſt, an heretique may be convicted [a] before the archbiſhop and other biſhops, and other the clergy at a generall ſynod, or convocation, as it appeareth both by our books, and by hiſtory. See the ſtatute of 25 H. 8. cap. 19. revived by 1 El. cap. 1.

[b] And the biſhop of every dioces may convict any for hereſie, and ſo might he have done before the ſtatute of 2 H. 4. ca. 15. as it appeareth by the preamble of that act in theſe words.

[a] Bract. l. 3. fo. 123. & 124. in Conc' Oxon. Newburg. li. 2. ca. 13. 6 H. 3. Stow. Holl. 203. 2 H. 4. Rot. Parl. nu. 29 Sautries caſe. Fitz. N. B. 269. a. 1 El. ca. 1. [b] Vid. 23 H. 8. ca. 9. F. N. B. Ubi ſupra. 5 El. ca. 23. 10 H. 7. 17. b. Doct. & Stud. lib. 2. ca. 29. Br. 2. Mar. tit. Hereſy 1.

Whereas the dioceſans of the ſaid realme cannot by their juriſdiction ſpirituall, without aid of the ſaid royall majeſty, ſufficiently correct the ſaid falſe and perverſe people, (i. heretiques named before) becauſe the ſaid falſe and perverſe people doe goe from dioces to dioces, and will not appear before the ſaid dioceſans, but the ſame dioceſans and their juriſdiction ſpirituall, and the keys of the church with the cenſures of the ſame, doe utterly contemn and deſpiſe.

Now that ſtatute doth provide, that the dioceſan of the ſame place, ſuch perſon or perſons, &c. may cauſe to be arreſted, and under ſafe cuſtody in his priſons to be detained. From this act and other acts and authorities quoted in the margent, theſe two concluſions are to be gathered. Firſt, that the dioceſan hath juriſdiction of hereſy, and ſo it hath been put in ure in all queen Elizabeth's reign: and accordingly it was reſolved by Flemming chief juſtice, Tanfield chief baron, Williams, and Crook juſtices, Hil. 9. Ja. R. in the caſe of Legate the heretique, and that upon a conviction before the ordinary of hereſy, the writ of *de hæretico comburendo* doth lie. Secondly, that without the aid of that act of 2 H. 4. the dioceſan could impriſon no perſon accuſed of hereſy, but was to proceed againſt him by the cenſures of the church. And now ſeeing, that not only the ſaid act of 2 H. 4. but 25 H. 8. c. 14. are repealed, the dioceſan cannot impriſon any perſon accuſed of hereſy, but muſt proceed againſt him, as he might have done before thoſe ſtatutes, by the cenſures of the church, as it appeareth by the ſaid act of 2 H. 4. c. 15. Likewiſe the ſuppoſed ſtatute of 5 R. 2. c. 5. and the ſtatutes of 2 H. 5. c. 7. 25 H. 8. c. 14. 1 & 2 Ph. and Mar. c. 6. are all repealed, ſo as no ſtatuto made againſt heretiques ſtandeth now in force;

[40]

Mat. Hammond Anno 21 El. Holl. 1579. Stowe. 1161. Hil. 9. Ja. Regis Legates caſe.

Vide 1. E. 6. c. 21. 1 El. c. 1.

force: and at this day no perſon can be indicted, or impeached for hereſy before any temporall judge, or other, that hath temporall juriſdiction, as upon peruſall of the ſaid ſtatutes appeareth.

Every archbiſhop of this realme may cite any perſon dwelling in any biſhops dioces within his province for cauſes of hereſy, if the biſhop, or other ordinary immediate thereunto conſent, or if that the ſame biſhop, or other immediate ordinary, or judge doe not his duty in puniſhment of the ſame. 23 H. 8. ca. 9.

2. Touching the ſecond point, if any perſon be charged with hereſy before the high commiſſioners, they have no authority to adjudge any matter or cauſe to be hereſy, but only ſuch, as hath been ſo adjudged by the authority of the canonicall ſcripture, or by the firſt four generall councells, or by any other generall councell, wherein the ſame was declared hereſie by the expreſſe and plain words of the canonicall ſcripture, or ſuch as ſhall hereafter be determined to be hereſy by parliament, with the aſſent of the convocation: for ſo it is expreſly provided by the ſaid act of 1 El. And albeit this proviſo extendeth only to the ſaid high commiſſioners, yet ſeeing in the high commiſſion, there be ſo many biſhops, and other divines, and learned men, it may ſerve for a good direction to others, eſpecially to the diocefan, being a ſole judge in ſo weighty a cauſe.

No manner of order, act, or determination for any matter of religion, or cauſe eccleſiaſticall, had or made by the authority of the parliament in *anno* 1 El. ſhall be accepted, deemed, interpreted, or adjudged hereſy, ſchiſm, or ſchiſmaticall opinion, any order, decree, ſentence, conſtitution, or law (whatſoever the ſame be) notwithſtanding. 1 El. ca. 1.

There was a ſtatute ſuppoſed to be made in 5 R. 2. that commiſſions ſhould be by the lord chancellor made, and directed to ſherifs, and others, to arreſt ſuch as ſhould be certified into the chancery by the biſhops, and prelates, * maſters of divinity, to be preachers of hereſies, and notorious errors, their fautors, maintainers, and abetters, and to hold them in ſtrong priſon, until they will juſtifie themſelves to the law of holy church. By colour of this ſuppoſed act, [a] certaine perſons, that held, that images were not to be worſhipped, &c. were holden in ſtrong priſon, until they (to redeem their vexation) miſerably yeelded before theſe maſters of divinity to take an oath, and did ſwear to worſhip images, [b] which was againſt the morall and eternall law of Almighty God. We have ſaid (by colour of the ſaid ſuppoſed ſtatute, &c.) not only in reſpect of the ſaid opinion, but in reſpect alſo, that the ſaid ſuppoſed act, was in truth never any act of parliament, though it was entred in the rolls of the parliament, for that the commons never gave their conſent thereunto. And therefore in the [c] next parliament, the commons preferred a bill reciting the ſaid ſuppoſed act, and conſtantly affirmed, that they never aſſented thereunto, and therefore deſired that the ſaid ſuppoſed ſtatute might be anienied, and declared to be void: for they proteſted, that it was never their intent to be juſtified, and to bind themſelves and their ſucceſſors to the prelates, more then their anceſtors had done in times paſt: and hereunto the king gave his royall aſſent in theſe words, *Ypleiſt au roy*. And mark well the manner of the penning the act: for ſeeing the commons did not aſſent thereunto, the words of the act be,

5 R. 2. ſtat. 2. cap. 5. repealed by 1 E. 6. c. 12. & 1 Eliz. ca. 1.
* *In diebus illis* Maſters of divinity (and batchelors of divinity) now doctors of divinity and batchelors.
[a] Rot. clauſ. 19 R. 2. m. 17. in Dorſ.
[b] Exod. 20. 4. Levit. 26. 1. Deut. 5. 8. & 16. 22. Pſal. 97. 7. 1 John 5. 21.
[c] Rot. Parl. 6 R. 2. nu. 62. *Vide* 7 H. 4. nu. 62. Rot. Parl.

[41]

It is ordained and aſſented in this preſent parliament, that, &c. And ſo it was, being but by the king and the lords.

It is to be known, that of ancient time, when any acts of parliament were made, to the end the ſame might be publiſhed, and underſtood, eſpecially before the uſe of printing came into England, the acts of parliament were ingroſſed into parchment, and bundled up together with a writ in the king's name, under the great ſeal to the ſherif of every county, ſometime in Latin, and ſometime in French, to command the ſherif to proclaim the ſaid ſtatutes within his bayliwick, as well within liberties, as without. And this was the courſe of parliamentary proceedings, before printing came in uſe in England, and yet it continued after we had the print, till the reign of H. 7.

Now at the parliament holden in 5 R. 2. John Braibrook biſhop of London being lord chancellor of England, cauſed the ſaid ordinance of the king and lords to be inſerted into the parliamentary writ of proclamation to be proclaimed amongſt the acts of parliament: which writ I have ſeen, the purcloſe of which writ, after the recitall of the acts directed to the ſherif of N. is in theſe words. *Nos volentes dictas concordias, ſive ordinationes in omnibus et ſingulis ſuis articulis inviolabiliter obſervari, tibi præcipimus quòd prædictas concordias, ſive ordinationes in locis infra balivam tuam, ubi melius expedire volueris, tam infra libertates, quam extra, publicè proclamari, et teneri facias juxta formam prænotatam. Teſte rege apud Weſtm. 26 May, anno regni regis R. 2. 5.* But in the parliamentary proclamation of the acts paſſed in *anno* 6 R. 2. the ſaid act of 6 R. 2. whereby the ſaid ſuppoſed act of 5 R. 2. was declared to be void, is omitted: and afterwards the ſaid ſuppoſed act of 5 R. 2. was continually printed, and the ſaid act of 6 R. 2. hath by the prelates been ever from time to time kept from the print.

Coram Rege Hil. 1 H. 5. Rot. 4. & 5.

Certain men called Lollards were indicted for hereſy, upon the ſaid ſtatute of 2 H. 4. for theſe opinions, viz. *Quod non eſt meritorium ad Sanctum Thomam, nec ad Sanctam Mariam de Walſingham peregrinari. 2. Nec imagines crucifixi et aliorum ſanctorum adorare. 3. Nulli ſacerdoti confiteri niſi ſoli Deo, &c.* Which opinions were ſo far from hereſy, as the makers of the ſtatute of 1 Eliz. had great cauſe to limit what hereſy was.

Indictment generall. *Vide ſupra* ca. 1. *Verbo, per overt fait. Lollardi et falſi hæretici.*

And afterwards they thought not good to contain theſe opinions in any indictment, but indicted them in general words, one of which indictments as to lollardry and hereſy followeth. *Jurati dicunt ſuper eorum ſacramentum, quod A. R. E. D. Lollardi et falſi hæretici die Jovis poſt hebdomadam Paſchæ, anno regni regis H. 6. poſt conqueſtum nono, apud Abendon in com' Berks infra vig. falſò et proditoriè ut communes proditores, et inſurrectores conſpiraverunt, imaginati fuerunt, et ad invicem confœderaverunt cum quamplurimis proditoribus illis aſſociatis, et felonibus de eorum comitiva, et eorum falſa malitia præcogitata, ut communes inſidiatores altarum viarum, ad fidem catholicam deſtruendam, et ibidem falſo et proditoriè ut communes proditores, et felones dicti d'ni regis fecerunt, et ſcripſerunt diverſas falſas billas, et ſcripturas ſeditioſas, et nonnulla fidei et doctrinæ Chriſtianæ contraria continentes, et eas populo domini regis publicandas et credendas falſò, damnabiliter in diverſis locis, viz. in civitatibus London, Sarum, et villis de Coventria et Marleburgh, nequiter poſuerunt, ſiccerunt, et projecerunt, ac indies ſic ſcribere, affigere et projicere et ponere non ceſſant, nec formidant, in graviſſi-*

Communes inſidiatores viarum. Vide ſup. c. 1. ſ. 5. *Ad fidem catholicam deſtruendam. Diverſas falſas billas et ſcripturas, &c.*

mam

mam majeſtatis, et coronæ dignitatis regis noſtri offenſam, et Chriſtianæ fidei ludibrium, et pacis dicti domini regis perturbationem, et omnium Chriſti fidelium injuriam et contemptum. Which generall indictment, and all other of like form were utterly inſufficient in law: for albeit the words of the ſtatute be generall, yet the indictment muſt contain certainty, whereunto the party indicted may have an anſwer. Alſo where the parties are indicted, *ut communes inſidiatores viarum*, that alſo is inſufficient, as it appeareth by the ſtatute 4 H. 4. ca. 2.

[42]

John Keyſer was excommunicated by the greater excommunication before Thomas archbiſhop of Canterbury, and legate of the apoſtolique ſee, at the ſuit of another, for a reaſonable part of goods, and ſo remained eight months: the ſaid Keyſer openly affirmed that the ſaid ſentence was not to be feared, neither did he fear it. And albeit the archbiſhop, or his commiſſary hath excommunicated me, yet before God I am not excommunicated: and he ſaid that he ſpake nothing but the truth, and it ſo appeared; for that he the laſt harveſt ſtanding ſo excommunicate, had as great plenty of wheat, and other grain, as any of his neighbours, ſaying to them in ſcorn (as was urged againſt him) that a man excommunicate ſhould not have ſuch plenty of wheat. The archbiſhop denying theſe words to be within the ſaid act of 2 H. 4. did by his warrant in writing comprehending the ſaid cauſe, by pretext of the ſaid act commit the body of the ſaid Keyſer to the gaol at Maidſtone, for that (ſaith he) in reſpect of the publiſhing of the ſaid words, *dictum Johannem non immeritò habemus de hæreſi ſuſpectum.* By reaſon whereof the ſaid John Keyſer was impriſoned in Maidſtone gaol, and in priſon detained under the cuſtody of the keeper there, untill by his counſell he moved ſir John Markham then chief juſtice of England, and other the judges of the king's bench, to have an *Habeas corpus*, and thereupon (as it ought) an *Habeas corpus* was granted: upon which writ the gaoler returned the ſaid cauſe, and ſpeciall matter, and withall, according to the writ, had his body there. The court upon mature deliberation peruſing the ſaid ſtatute, (and upon conference with divines) reſolved, that upon the ſaid words Keyſer was not to be ſuſpect of hereſy, within the ſaid ſtatute, as the archbiſhop took it. And therefore the court firſt bayled him, and after he was delivered: for that the archbiſhop had no power by the ſaid act for thoſe words to commit him to priſon.

Mich. 5 E. 4. Rot. 143. Coram Rege. In rationabili parte bonorum.

Hillary Warner being an inhabitant within the pariſh of S. Dunſtans in the Weſt, held opinion and publiſhed there, and in divers other places, *quòd non tenebatur ſolvere aliquas decimas curatori ſive eccleſiæ parochiali ubi inhabitabat.* Whereupon Richard biſhop of London commanded Edward Vaughan and others to arreſt the ſaid Hillary Warner: by force whereof they did arreſt him, and detained him in priſon a day and a night, and then he eſcaped. Hillary Warner brought his action of falſe impriſonment againſt Edward Vaughan and others: in bar whereof the defendants pleaded the ſtatute of 2 H. 4 and that the plaintif held and publiſhed the opinion aforeſaid; which opinion was, *contra fidem catholicam, ſeu determinationem ſanctæ eccleſiæ*, and that the defendants, as ſervants to the ſaid biſhop, and by his commandment did arreſt the plaintif, and juſtified the impriſonment: whereupon Hillary Warner the plaintiff demurred in law, and after long and mature deliberation

Mich. 11. H. 7. Rot. 327. In communi banco.

beration it was by Brian chief juſtice, and the whole court of common pleas adjudged, that the ſaid opinion was not within the ſaid ſtatute of 2 H. 4. for that it was an error, but no hereſy. Which I have the rather reported, for that the reporter of this caſe did not only miſreport the time of the bringing of the action, but the ſtatute, which was the ground of the matter in law, and leaveth out the judgement. The record it ſelf is worthy the reading.

Hil. 10 H. 7. f. 17.

Upon that which hath been ſaid touching the ſaid ſtatute of 2 H. 4. four concluſions doe neceſſary follow. Firſt, that ſeeing, that many opinions were by the biſhops taken to be hereſy, which in troth had no ſhadow of hereſy, and ſo miſtaken, and unjuſtly extended by the biſhops further than the purvien, and true intention thereof, as by that which hath been, and might be ſaid, appeared, the makers of the ſaid act of parliament of 1 El. had great reaſon to limit (as hath been ſaid) what opinions ſhould be judged hereſy by authority of that commiſſion grounded upon that act. Secondly, that if any eccleſiaſticall judge or commiſſioner ſhall by pretext of any ſtatute, or other cauſe, commit any man to priſon, upon motion in court on the behalf of the party impriſoned, the judges of the common law ought to grant an *Habeas corpus* for him: upon the retorn of which writ, if it ſhall appear to the judges, that the impriſonment is well warranted by law, the party ſhall be remanded: and if the impriſonment be without warrant of law, then the party ought to be delivered. Thirdly, if the impriſonment be not warranted by law, the party impriſoned may have his action of falſe impriſonment, and recover his damages. Fourthly, that when an act of parliament is made concerning matter meerly ſpirituall, as hereſie, &c. yet that act being part of the lawes of the realm, the ſame ſhall be conſtrued and interpreted by the judges of the common lawes, who uſually confer with thoſe that are learned in that profeſſion. But let us now deſcend to the third point.

See in the ſecond part of the Inſtitutes, the expoſition upon the ſtatute of *Artic. Cleri*, the reſolution of all the judges of England to the 21 and 22 articles, or objections.

[43]

3. To the third. [a] It appeareth by Bracton, Britton, Fleta, Stanford, and all our books, that he that is duly convict of hereſie, ſhall be burnt to death.

[a] Mir. cap. 4. de Majeſtie. Bracton, ubi ſupra. Britton, cap. 9. Fleta lib. 1. ca. 35. Regiſter. F. N. B. 269.

4. To the fourth. [b] The eccleſiaſticall judge at this day cannot commit the perſon that is convict of hereſie to the ſheriffe, albeit he be preſent, to be burnt; but muſt have the king's writ *de hæretico comburendo*, according to the common law: for now all acts of parliament (as hath been ſaid before) againſt hereticks are repealed. And the reaſon wherefore hereſie is ſo extremely and fearfully puniſhed, is, for that *gravius eſt æternam, quam temporalem lædere majeſtatem*: and *hæreſis eſt lepra animæ*. [c] The party duly convicted of hereſie, may recall, and abjure his opinion, and thereby ſave his life, but a relapſe is fatall: for as in caſe of a diſeaſe of the body, after recovery, recidivation is extremely dangerous: ſo in caſe of hereſie (a diſeaſe of the ſoule) a relapſe is irrecoverable. And as he that is a leper of his body, is to be removed from the ſociety of men, leſt he ſhould infect them, by the king's writ *de leproſo amovendo*: ſo he that hath *lepram animæ*, that is, to be convicted of hereſie, ſhall be cut off, leſt he ſhould poyſon others, by the king's writ *de hæretico comburendo*. But if the heretick will not after conviction abjure, he may by force of the ſaid writ [d] *de hæretico comburendo* be burnt without abjuration.

[b] F. N. B. 269. Rot. Par. 2 H. 4. nu. 29. Sautryes caſe. Bre. de hæretico comburendo per regem & concilium in parliamento.

[c] 2 Mar. tit. hereſie, Br. 7.

[d] 2 Mar. ubi ſupra.

[e] Vid. Doct. et Stud. lib. 2. ca. 29.

3. As to the fifth. [e] The ſtatute made in the 2 year of H. 5. cap.

cap. 7. whereby the forfeiture of lands in fee-ſimple, and goods, and chattels was given in caſe of hereſie, ſtandeth repealed by the act of 1 Eliz. cap. 1. The books that ſpeak of this forfeiture are grounded upon the ſaid act of 2 H. 5. which then ſtood in force, ſaving 5 R 2. which was before that ſtatute: for there, though Belknap ſwore, *per ma foy ſi home ſoit miſcreant, ſa terre eſt forfeitable, et le ſeigniour avera ceo p. voy deſcheate;* yet was his opinion never holden for law: for neither lands, nor goods [f] before the making of that ſtatute of 2 H. 5. were forfeited by the conviction of hereſie, becauſe the proceeding therein is meerely ſpirituall, *pro ſalute animæ*, and in a court that is no court of record. And therefore the conviction of hereſie worketh no forfeiture of any thing that is temporall, viz. of lands or goods. [g] For what cauſe the ſaid hereticks were called Lollards you may read in Caudries caſe, and Linwood thereto agreeth. * And it is to be obſerved, that in proceeding againſt Lollards, the prelats, beſides their opinions, did charge them with hainous offences: as conſpiracy with multitudes of people, inſurrection, rebellion, or ſome other treaſon, or great crimes.

We have ſpoken thus much of this argument, becauſe there be divers wandring opinions concerning ſome of theſe points, that are not agreeable to the law, as it ſtandeth at this day. See the fourth part of the Inſtitutes, cap. Chancery, in the articles againſt Cardinal Woolſey, artic. 44.

Br. tit. Forfeiture 112. Stan. pl. cor. 35. I. 2 Mar. Br. tit. Hereſie.

[f] Vid. hereafter in caſe of piracy.

[g] Lib. 5. Caudries caſe, fol. 25. b.

* 1 H. 5. fo. 6. a. Rot. Parl. 5 H. 5. nu. 11. in the caſe of Sir *John Oldcaſtle.* Paſch. 9 H. 6. *John Sharps caſe*, &c. Rot. Parl. 7 H. 4. nu. 67. 11 H. 4. nu. 29. 3 H. 5. nu. 39. 1 H. 6. nu. 20.

CAP. VI.

Of Felony by Conjuration, Witchcraft, Sorcery, or Inchantment.

THE firſt act of parliament that made any of theſe offences felony, was the ſtatute [a] of 33 H. 8. which was repealed by the ſtatutes of 1 E. 6. cap. 12. and 1 Mariæ. But [b] before the conqueſt it was ſeverely puniſhed: ſometimes by death, ſometimes by exile, &c. [c] And after, it was made felony by the ſtatute of 5 Eliz. and againe by 1 Jac. which repealeth 5 Eliz.

[a] 33 H. 8. ca. 8. 1 E. 6. cap. 12.

[b] Inter leges Alveredi, fo. 23. Edwardi et Guthruni, cap. 11. Ethelſtani, ca. 6. Canuti, 4, 5.

[c] 5 Eliz. ca. 16. 1 Jac. cap. 12.

A conjurer is he that by the holy and powerfull names of Almighty God invokes and conjures the devill to conſult with him, or to do ſome act.

A conjurer deſcribed.

A witch is a perſon that hath conference with the devill, to conſult with him or to do ſome act.

A witch deſcribed.

An inchanter, *incantator*, is he, or ſhe *qui carminibus, aut cantiunculis dæmonem adjurat.* They were of ancient time called *carmina*, becauſe in thoſe dayes their charmes were in verſe.

An inchanter deſcribed.

Carminibus Circe ſocios mutavit Ulyſſis.
By charmes in rhyme (O cruell fates!)
Circe transform'd Ulyſſes mates.

And again. *Carmina de cœlo poſſunt detrudere lunam.*
By rhymes they can pul down full ſoon,
From lofty ſky the wandring moon.

* A ſorcerer, *ſortilegus, quia utitur ſortibus in cantationibus dæmonis.*

* A ſorcerer deſcribed.

Exod. cap. 22. 17. Deut. ca. 18. 10, 11, 12. Num ca. 23. 23. 1 Reg. ca. 15. 23.

monis. Thou ſhalt not ſuffer a witch to live. *Non eſt augurium in Jacob, nec divinatio in Iſrael.* And the Holy Ghoſt hath compared the great offence of rebellion to the ſinne of witchcraft.

And here it juſtly may be demanded, what puniſhment was againſt theſe deviliſh and wicked offenders before theſe ſtatutes, which were made of very late time.

[d] Linwood de officio arch-preſb. § Ignorantia.

And it appeareth by our ancient [d] books that theſe horrible and deviliſh offenders, which left the everliving God, and ſacrificed to the devill, and thereby committed idolatry, in ſeeking advice and aide of him, were puniſhed by death. * The Mirror ſaith, *Que ſorcery et devinal ſont members de hereſie.* And there he deſcribeth hereſie. *Hereſie eſt un mauuaſe et faux creance ſurdant de error en la droit foy Chriſtien:* and after ſaith, *Le judgement de hereſie eſt dēe arſe in cendre.* And herewith agreeth Britton: *Sorcerers, ſorcereſſes, &c. et miſcreants ſoient arſes.* And Fleta: *Chriſtiani autem apoſtatæ, ſortilegi, et hujuſmodi detractari debent, et comburi.* And burning then was, and yet is the puniſhment for hereticks. So as the conuſance of theſe offences, if they be branches of hereſie, (as the law was then taken) belonged (as to this day hereſie doth) to eccleſiaſtical judges. In which caſe when they have given ſentence, there lieth a writ *de hæretico comburendo.*

* Mir. cap. 1. §. 5. & cap. 2. § 12. & cap. 4. § De majeſtie. Brit. fo. 16. b. & 71. F. N. B. 269. b.

[e] Int. leges Edw. ca. 11. fo. 55. & Ethelſtani ca. 6. fo. 60. & Canuti cap. 5. fo. 5. 45 E. 3. 17. b.

I have ſeen a report of a caſe in an ancient Regiſter, that in October *anno* 20 H. 6. Margery Gurdeman of Eye, in the county of Suffolk, was for witchcraft and conſultation with the devill, after ſentence and a relapſe, burnt by the king's writ *de hæretico comburendo.* [e] And this agreeth with antiquity, for witches, &c. by the laws before the conqueſt were burnt to death.

A man was taken in Southwark with a head and a face of a dead man, and with a book of ſorcery in his male, and was brought into the king's bench before Sir John Knevett then chief juſtice: but ſeeing no indictment was againſt him, the clerks did ſwear him, that from thenceforth * he ſhould not be a ſorcerer, and was delivered out of priſon, and the head of the dead man and the book of ſorcery were burnt at Tuthill at the coſts of the priſoner. So as the head and his book of ſorcery had the ſame puniſhment, that the ſorcerer ſhould have had by the ancient law, if he had by his ſorcery praied in aid of the devill.

*Some think that this ſhould be the oath of allegiance, *Que il ſerra foial et loiall, &c.* Vid. 25 E. 3. 42. B. Coron. 131. See hereafter ca. 74. of perjury, verb. That as well the judge, &c.

1 Chron. chap. 10. v. 13, 14. 1 Reg 15. 23. * Nota. 1 Reg. 28. 8.

The holy hiſtory hath a moſt remarkable place concerning the reprobation and death of king Saul. *Mortuus eſt ergo Saul propter iniquitates ſuas, eò quòd prævaricatus ſit mandatum Domini, et non cuſtodierit illud, * ſed inſuper Pythoniſſam conſuluerit, nec ſperaverit in Domino, propter quod interfecit eum, et tranſtulit regnum ejus ad David filium Iſai.* So Saul died for his tranſgreſſion which he committed againſt the Lord, even againſt the word of the Lord which he kept not: and alſo for aſking counſell of one that had a familiar ſpirit, to enquire of it, and enquired not of the Lord; therefore he ſlew him, and turned the kingdome unto David the ſonne of Iſai.

Therefore it had been a great defect in government, if ſo great an abomination had paſſed with impunity. And this is the cauſe, that we have proved how and in what manner conjuration, witchcraft, &c. were puniſhed by death, &c. before the making of the ſaid late ſtatutes.

1 Jac. cap. 12.

But now let us peruſe the ſtatute made in the firſt year of king James,

James, which only ſtandeth in force, and divideth itſelf into five ſeverall branches.

1. If any perſon or perſons ſhall uſe, practiſe, or exerciſe any invocation or conjuration of any evill and wicked ſpirit.

Here the devill by the holy, and powerfull names of Almighty God is invoked (as hath been ſaid:) and this invocation, or conjuration of a wicked ſpirit is felony, without any other act or thing, ſave only the apparition of the ſpirit. See W. 1. cap. 41. in the oath of the champion, &c.

2. Or ſhall conſult, covenant with, entertaine, employ, feed, or reward, any evill or wicked ſpirit, to, or for any intent or purpoſe.

By this branch, if any conſult, &c. (howſoever the wicked ſpirit appeareth and commeth) theſe actions (here mentioned) with or to that wicked ſpirit, to or for any intent or purpoſe, is felony without any other act or thing.

3. Or take up any dead man, woman, or childe, out of his, her, or their grave, or any other place where the dead body reſteth, or the ſkin, bone, or any part of a dead perſon, to be imployed or uſed in any manner of witchcraft, ſorcery, charme, or inchantment.

Albeit the offender that commits theſe barbarous and inhumane dealings with the bodies of the dead, do not actually imploy or uſe them in witchcraft, ſorcery, charme, or inchantment: yet if he did them of purpoſe to uſe therein, it is felony, for the words of this branch be, [to be imployed or uſed in any manner of witchcraft, &c.]

4. Or ſhall uſe, practiſe, or exerciſe any witchcraft, inchantment, charme or ſorcery, whereby any perſon ſhall be killed, deſtroyed, waſted, conſumed, pined, or lamed, in his, or her bodie, or any part thereof.

By this branch, no other witchcraft, inchantment, charme, or ſorcery (then is before ſpecified) is felony, unleſſe by means thereof ſome perſon be killed, deſtroied, waſted, conſumed, pined or lamed, &c. Which words have reference only to this laſt generall clauſe.

5. That then every ſuch offender or offenders, their aiders, abetters, and counſellors, being of any the ſaid offences duly and lawfully convicted, and attainted, ſhall ſuffer paines of death, as a felon, or felons, and ſhall loſe the priviledge, and benefit of clergie, and ſanctuary.

Albeit acceſſories before be here ſpecially named, yet acceſſories after may be of this felony, as afterwards is ſaid upon the ſtatute of 3 H. 7. for taking away of women, and upon the ſtatute of 8 H. 6. for ſtealing of records.

The ſecond part of this act concerneth felony in a ſecond degree; and the branches thereof are alſo in number five.

[46] 1. If any perſon or perſons take upon him or them by witchcraft, inchantment, charme, or ſorcery, to tell or declare, in what place any treaſure of gold or ſilver ſhould or might be found, or had in the earth, or other ſecret places.

The miſchiefs before this part of the act was: That divers impoſtors, men and women would take upon them to tell, or do, theſe five things here ſpecified, in great deceipt of the people, and cheating and couſening them of their money, or other goods. Therefore was this part of the act made, wherein theſe words [take upon him or them] are very remarkable. For if they take upon them, &c. though in truth they do it not, nor can do it, yet are they in danger of this firſt branch.

2. Or where goods, or other things loſt, or ſtoln ſhould be found or become.

Herein they become offenders, if they take upon them as aforeſaid. And note, the taking upon them, to tell and declare, governe both theſe branches.

3. Or to the intent to provoke any perſon to unlawfull love.

Herein alſo they become offenders, by taking upon them, as is aforeſaid. Here is the change of a new verbe, viz. [to provoke] ſo as the ſenſe is, if any perſon or perſons ſhall take upon him or them by witchcraft, inchantment, charme or ſorcery, to the intent, to provoke any perſon to unlawfull love.

4. Or whereby any cattel or goods of any perſon ſhall be deſtroyed.

The letter of this branch is this: If any perſon ſhall take upon him by witchcraft, inchantment, charm, or ſorcery, whereby any cattell or goods of any perſon ſhould be deſtroyed. Although this be not ſententious, yet the meaning thereof is to be taken, by ſupplying theſe words after ſorcery [any thing] and not to turn [deſtroyed] into the infinitive mood, as the reſt be; for then it ſatisfied not the meaning of the makers: for a taking upon them to deſtroy cattel, &c. if they be not deſtroyed, is not within the danger of this act, and therefore muſt be ſupplied as is aforeſaid.

5. Or to hurt or deſtroy any perſon in his or her body, although the ſame be not effected or done.

As

As in the caſe of cattel or goods, the deſtruction muſt be (as is aforeſaid) effected and done: ſo in caſe of the perſon of man, woman, or childe, though the hurt be not effected, or done; yet is the taking upon him, &c. to hurt or deſtroy any perſon, &c. within this branch.

Being therefore lawfully convicted.

Here [convicted] is taken in a large ſenſe for attainted, and the rather, for that after in this act the words be [lawfully convicted and attainted, as is aforeſaid.]

Shall for the ſaid offence, &c.

Here are expreſſed the puniſhments inflicted upon theſe impoſtors, mountebanks, and cheating quackſalvers, viz. 1. To ſuffer impriſonment by the ſpace of a whole year without bail or mainprize. 2. Once every quarter of the year theſe mountebanks are to mount the pillory, and to ſtand thereupon in ſome market towne ſix houres, and there to confeſs his or her error, and offence.

And if any perſon being once convicted of the ſame offences, &c.

Here is alſo [convicted] taken for attainted, for he ſhall not be drawn in queſtion for the ſecond offence, to make it felony, till judgement be given againſt him for the firſt; for the indictment of felony recites the former attainder, and the ſecond offence muſt be committed after the judgement. And ſo it is in the caſe of forgery upon the ſtatute of 5 Eliz. and in caſe of conveighing of ſheep alive out of this realme, and ſome others. 5 Eliz. cap. 14. 8 Eliz. cap. 3.

Saving to the wife of ſuch perſon as ſhall offend in any thing contrary to this act, her title of dower, and alſo to the heire and ſucceſſor of every perſon, his or their titles of inheritance, ſucceſſion, and other rights, as though no ſuch attainder of the anceſtor or predeceſſor had been made.] [47]

The judgement againſt a felon is, that he be hanged by the neck until he be dead: and albeit nothing elſe is expreſſed in the judgement, yet by the common law many things are therein implied; as the loſſe of his wives dower, the loſſe of his inheritance, corruption of his blood, forfeiture of his goods, &c. Now a ſaving will ſerve for any thing, that is implied in the judgement, as in this caſe for the wives dower, and alſo for the heirs inheritance, and for all the reſt of the things implied in the judgement. But a ſaving will not ſerve againſt the expreſſe judgement in caſe of felony, for that ſhould be repugnant; as ſaving the life of the offender ſhould be void, becauſe it is repugnant to the expreſſe judgement, viz. that he be hanged by the neck until he be dead. Alſo where the ſaving is to the heir, it is well ſaved by the name of the heir, becauſe notwithſtanding the forfeiture implied in the judgement, his inheritance is ſaved, and by conſequent the blood not corrupted, for

See the 1. part of the Inſtitutes. ſect. 747.

Vide lib. 1. in the caſe of Alton Woods. fo.

if

if the blood were corrupted, he could not inherit as heir, but notwithſtanding this ſaving the lands are forfeited during his life.

5 El. cap. 14. The ſtatute of 5 Eliz. for preſervation of the wives dower, and the heirs inheritance, in caſe of forgery, is penned in this form. 'Provided alway, that ſuch attainder of felony ſhall not in any wiſe extend to take away the dower of the wife of any ſuch perſon attaint: nor to the corruption of blood, or diſheriſon of any heir or heirs of any ſuch perſon attaint.

8 El. ca. 3. The words of the ſtatute of 8 Eliz. be, Provided always that this act ſhall not extend to corruption of blood, or be prejudiciall or hurtfull to any woman claiming dower by or from any ſuch offender, &c. Wherein it is to be obſerved, that by the avoidance of corruption of blood, the inheritance is impliedly ſaved. See the

31 El. ca. 4. manner of the penning of the act of 31 Eliz. concerning this matter and divers others.

See the ſtatute of 3. Ja. ca. 4. And ſurely it is very convenient that when new felonies be made by act of parliament, that ſuch ſavings or proviſions be made both for the wives dower, and the heirs inheritance, as were had and made in theſe preſidents.

CAP. VII.

OF MURDER.

[a] See the 1. pt. of the Inſtit. for the word Murder, ſect. 287. and for Felony, ſect. 500 & 745. See the 2. part of Inſtit. Marlbr. ca. 25. Cuſt. de Norm. cap. 68.

HAVING [a] now paſſed High Treaſon, Petit Treaſon, Miſpriſion of Treaſon, Felony by the ſtatute of 3 H. 7. Hereſy, and Conjuration, Witchcraft, &c. we are next in order to treat of felonies in general: and of all felonies, murder is the moſt hainous. *Inter leges Canuti*, ca. 61. fo. 118. *Cædes manifeſtæ numerantur inter ſcelera nullo humano jure expiabilia.* See here, ca. Pardon. And of all murders, murder by poyſoning is the moſt deteſtable. Therefore firſt of murder. *Murdrum* is derived of the Saxon word *mord.*

[b] *The definition of murder.* Vid. devant. ca. Treaſon. verb. Quant home, &c. Bract. l. 3. fo. 120, 121, 134, 135. Brit. fo. 5. 18. Fleta, lib. 1. cap. 23. & 30. Mirror, cap. 1. §. ca. 2. § 11. de Appeal de homicide.

[b] Murder is when a man of ſound memory, and of the age of diſcretion, unlawfully killeth within any county of the realm any reaſonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expreſſed by the party, or implied by law, ſo as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the ſame.

Hereof we will ſpeak, together with ſome things concerning the acceſſories to the ſame, and leave the reſidue to others, that have written thereof. Now let us examine the principal parts of this deſcription.

Tr. 32 E. 1. Coram Rege Rot. 15. 25 E. 3. 28. 26 Aſſ. p. 27. 3 E 3. cor. 383. 3 H. 7. ca. 1. 3 H. 7. 1. 12. 21 H. 7. 31. E. 2. Coron. 389. 1 Ma. Dier, 104. b. See the firſt part of the Inſtit. 104.

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Tr. 31. E. 3. Coram rege. Rot. 54. per meſ. canit.

Killing.] As by poyſon, weapon ſharp or blunt, gun, croſsbow, cruſhing, bruiſing, ſmothering, ſuffocating, ſtrangling, drowning, burning, burying, famiſhing, throwing down, inciting a dog,

a dog, or bear, &c. to bite, or hurt, &c. whereof death enſueth, laying a ſick man in the cold, &c.

Poyſon, *(Venenum, à venis, quia à venis permeat)* is, as hath been ſaid, the moſt deteſtable of all, becauſe it is moſt horrible, and fearfull to the nature of man, and of all others can be leaſt prevented, either by manhood, or providence: and that made Fleta to ſay, *Item nec per patriam ſe defendere delet quis de veneno dato, ſed tantum per corpus ſuum, eo quod initium facti non fuit tam publicum, quod ſciri poterit à patria, &c.* but that is not holden for law at this day. Bract. l. 3. f. 121. Brit. fo. 14. See lib. Intr. Coke 25. lib. 4. fo. 44. Vauxes caſe. Lib. 9. fo. 81. Agnes Gores caſe.

[a] This offence was ſo odious, that by act of parliament it was made high treaſon, and inflicted a more grievous and lingring death then the common law preſcribeth, viz. That the offender ſhould be boyled to death in hot water: upon which ſtatute [b] Margaret Davy a young woman was attainted of high treaſon for poyſoning of her miſtris, and ſome others were boyled to death in Smithfield the 17 day of March in the ſame yeer. But this act was too ſevere to live long, and therefore was repealed by 1 E. 6. cap. 12. and 1 Mar. cap. 1. Deut. 28. 24. Curſed is he that ſmiteth his neighbour ſecretly. [a] 22 H. 8. ca. 9. Read the ſtatute. Dier, 33 H. 8. fol. 50. a. Saccombes caſe.

All the ancient authors, *ubi ſupra*, of old time defined murder to be, *occulta hominis occiſio, &c.* when it was done in ſecret, ſo as the offender was not known: but now it is taken in a larger ſenſe. [b] Anno 33 H. 8.

Britton mentioneth another kind of murder (which is not holden for murder at this day) when he ſaith: *Ceux auxi que fauxement pur louer, ou en auter manner funt aſcun home damne ou fait damner au mort, &c.* yet this is murder before God. And David killed Uriah with his pen, and theſe men with their tongue. Britton, fo. 14.

Within any county of the realm.] [c] If two of the kings ſubjects goe over into a forain realm and fight there, and the one kill the other, this murder being done out of the realm, cannot be for want of triall heard and determined by the common law: [d] but it may be heard and determined before the conſtable and marſhall. [c] 13 H. 4. 5 & 6. Stanf. pl. cor. 65. Mic. 25 & 26 El. ſo reſolved in Dowties caſe. [d] 13 R. 2. ca. 2.

If A. give B. a mortal wound in a forain country, B. commeth into England and dieth: this cannot be tried by the common law, becauſe the ſtroak was given there, where no *viſne* can come, but the ſame ſhall be heard and determined before the conſtable and marſhall: for the words of the ſtatute of 13 R. 2. be: To the conſtable it pertaineth to have conuſance of contracts, concerning deeds of arms, or of war out of the realm, and alſo of things that touch arms, or war within the realm, which cannot be determined or diſcuſſed by the common law. 1 H. 4. c. 14. Rot. Parl. 8 H. 6. nu. 38. 13 R. 2. ca. 2.

If a man be ſtrucken upon the high ſea, and dieth of the ſame ſtroke upon the land, this cannot be inquired of by the common law, becauſe no *viſne* can come from the place, where the ſtroke was given (though it were within the ſea pertaining to the realm of England, and within the liegeance of the king) becauſe it is not within any of the counties of the realm. Neither can the admirall hear and determine this murder, becauſe though the ſtroke was within his juriſdiction, yet the death was *infra corpus comitatus*, whereof he cannot inquire: neither is it within the ſtatute of 28 H. 8. becauſe the murder was not committed on the ſea. But by the ſaid act of 13 R. 2. the conſtable and marſhall may hear and determine the ſame. And before the making of the ſtatute of 2 E. 6. if a man Lib. 2. fo. 93. Tr. 25 Eliz. in Lacyes caſe. Forteſcue, ca. 32. fo. 38. 28 H 8. ca. 13. 2 E. 6. ca. 24.

a man had been felonioufly ſtricken, or poyſoned in one county, and after had died in another county, no ſufficient indictment could thereof have been taken in either of the ſaid counties, becauſe by the law of the realm, the jurors of one county could not inquire of that, which was done in an other county. It is provided by that act that the indictment may be taken, and the appeal brought in that county, where the death doth happen. Before the making of this ſtatute, the appeal might have been brought in either of the ſaid counties, but the triall muſt have been out of both: but when both counties could not joyn, then both appeal and indictment failed at the common law.

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18 E. 3. 32.
9 H. 6. 63.
3 H. 7. 12.
4 H. 7. 18.
6 H. 7. 10.

But here be two things to be obſerved: firſt, that in caſe of treaſon or miſpriſion thereof, or of felony, or miſpriſion of the ſame within the realm, the party ought to be indicted within the ſame county, where the fact is done, and it cannot be alledged in any other county, then in truth where it was done. And therefore in the caſe above ſaid, neither the ſtroke, nor poyſoning, nor the death, though they be tranſitory, can be alledged in the indictment or appeal, but where in truth they were done. Secondly, the ſtatute of 2 E. 6. extendeth not where one is ſtricken or poyſoned on the ſea, or in any forain kingdome, and dieth in England, but where one is ſtricken or poyſoned in one county, and dieth in another.

This act extendeth where the murder, or felony is done in one county, and another ſhall be acceſſory in another county: whereof you may read at large in the lord Sanchar's caſe.

Lib. 9. fo. 117, 118. &c.

Richard Weſton being Sir Thomas Overburies keeper in the Tower of London, did poyſon him in that part of the Tower which is within London. R. earl of S. and F. his wife, James Franklin and Anne Turner were acceſſories before the fact in the county of Midd. and Sir Gervaſe Helwys lieutenant of the Tower was acceſſory before the fact in London. Now upon this ſtatute of 2 E. 6. ca. 24. divers queſtions were reſolved: firſt, if the acceſſory be in Midd. where the kings bench ſit, and the principall is attainted in another county, the kings bench may try the acceſſory, as it was reſolved in the lord Sanchars caſe, *ubi ſupra*. 2. If the indictment of the acceſſory be taken in the kings bench, the juſtices ſhall not by force of the ſtatute of 2 E. 6. write in their own names, *quia placita ſunt coram rege, & non coram juſticiariis*, but remove the record by the kings writ of *certiorari*. 3. Divers preſidents were ſhewn, that where acceſſories before the fact were in Midd. where the kings bench did ſit, &c. and the attainder of the principall had been in another county, the juſtices of the kings bench have removed the attainder by writ of *certiorari* before them. See the lord Sanchars caſe, *ubi ſupra*, and another caſe where the principall was attainted in the county of Oxon, before juſtices of oier and terminer, and the acceſſory was in Midd. where the kings bench ſate. 4. Richard Weſton being attainted as principall in the city of London, proceeding was to be had againſt James Franklin and Anne Turner in the kings bench where they were indicted. The queſtion was, if the kings bench ſhould remove the record of the attainder of the principall by *certiorari* before them, and after the ſaid earl and his wife ſhould be tried by their peers before the lord ſteward, whether the Lord ſteward might write to the kings bench for the record of the attainder: for the words of 2 E. 6. be, Shall write to the *cuſtos rotulorum*, or keepers of the record where ſuch

Mich. 13 Jac. regis. Sir Thomas Overburies caſe. See hereafter. ca. 62. of Indictments more of this caſe.

ſuch principall ſhall hereafter be attainted or convict. And to prevent all doubts, a ſpeciall writ was directed according to the words of the act, to the commiſſioners of oier and terminer, to certifie whether the principall was attainted, convicted, or acquitted; and they made a particular certificate accordingly: ſo as the record of the attainder remained ſtill with the commiſſioners of oier and terminer in London. 5. It was reſolved upon conſideration had of the whole act, that the words of the act being, the juſtices of gaol delivery, or of oier and terminer, or other there authorized, ſhall proceed, &c. the ſame extend to the high ſteward to write. &c.

The indictment of Richard Weſton was, that he 9 *die Maii anno* 11 *regis Jacobi, &c.* gave to Sir Thomas Overbury a poyſon called roſeacre in broth, which Sir Thomas Overbury not knowing it, received, *et ut idem Ri. Weſton præfatum Thomam Overbury magis celeriter interficeret, et murdraret,* 1 *Junii anno* 11 *Jac. regis,* gave unto him another poyſon called white arſenick. And that Richard Weſton, 10 *Julii, anno* 11. *Jac. regis,* gave unto him poyſon, called mercury ſublimat, in tarts, &c. *ut præd. Thomam magis celeriter interficeret, & murdraret.* And that a perſon unknown, by the procurement, and in the preſence of Richard Weſton, 14 Septemb. 11. *ſuprædicto,* gave to the ſaid Thomas a glyſter with poyſon in it, called mercury ſublimat, &c. *ut præd. Thomam magis celeriter interficeret et murdraret. Et prædict. Thomas Overbury de ſeparalibus venenis prædict. et operatione inde à prædict. ſeparalibus temporibus, &c. graviter languebat uſque* 15 *diem. Septemb. anno* 11. *ſupradicto, quo quidem* 15 *die Septembris, &c. prædictus Thomas de ſeparalibus venenis prædictis obiit venenatus.* And this was reſolved to be a good indictment by all the juſtices of the king's bench, although it doth not appeare in particular, of which of the ſaid poyſons he died. For the ſubſtance of the indictment was, whether he was poyſoned or no, by the ſaid Richard Weſton. And upon this indictment he was arraigned, pleaded not guilty, and had judgement given againſt him. And afterward Anne Turner, Sir Gervaſe Helwys lieutenant of the Tower, and Richard Franklin the phyſitian, were indicted as acceſſories before the fact, and arraigned, and pleaded not guilty: and it fell out in evidence, that Franklin had prepared divers other poyſons, then were contained in the indictment, as the powder of diamonds, the powder of ſpiders, lapis cauſticus, and cantharides, over and beſides the poyſons in the indictment. And it was reſolved, that any of theſe was ſufficient to prove the indictment; for the ſubſtance of the indictment was poyſoning, which (as hath been ſaid) is ſecret: ſee Machallis caſe *ubi ſupra,* and after verdict, judgement was given againſt all theſe acceſſories. And after, the ſaid earle and the counteſſe his wife were indicted as acceſſories before the fact, and were arraigned before the lord chancellor of England, and *hac vice,* lord high ſteward of England: and upon the arraignment of the counteſſe, ſhe confeſſed the indictment: and when the clerk of the crown did aſk her, What ſhe could ſay why judgement of death ſhould not be given againſt her? ſhe ſaid, That ſhe could ſay much againſt her ſelfe, but nothing for her ſelfe. And then the lord ſteward gave judgement of death againſt her, viz. That ſhe ſhould be hanged by the neck till ſhe were dead: and adjourned his commiſſion, (as it was reſolved he might do by law) untill the next day: and then

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the ſaid earle was arraigned, and pleaded not guilty, and put himſelf upon his peers, who found him guilty: and thereupon the lord ſteward gave the like judgement againſt him. Which caſe we have recited the more largely for two cauſes. Firſt, for that we remember not any of the nobility of this realm to have been attainted in former times for poyſoning of any. Secondly, for that it is the firſt caſe that fell out upon the ſaid act of 2 E. 6. in caſe of triall by peers of any that was noble, and the proceeding herein was by great adviſement. But now let us return where we left.

Reaſonable creature, in rerum natura.] As man, woman, childe, ſubject born, or alien, perſons outlawed, or otherwiſe attainted of treaſon, felony, or premunire, Chriſtian, Jew, Heathen, Turk, or other Infidel, being under the kings peace.

[a] A maſter of a ſhip and divers mariners, &c. were attainted of murder before juſtices in eire, for drowning of many Jewes within the county of Kent.

[b] If a woman be quick with childe, and by a potion or otherwiſe killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and ſhe is delivered of a dead childe, this is a great miſpriſion, and no murder: but if the childe be born alive, and dieth of the potion, battery, or other cauſe, this is murder: for in law it is accounted a reaſonable creature, *in rerum natura*, when it is born alive. And the [c] book in 1 E. 3. was never holden for law. And 3 Aſſ. p. 2. is but a repetition of that caſe. And ſo horrible an offence ſhould not go unpuniſhed. And ſo was the law holden [d] in Bractons time, *Si aliquis qui mulierem prægnantem percuſſerit, vel ei venenum dederit, per quod fecerit abortivum, ſi puerperium jam formatum fuerit; et maximè ſi fuerit animatum, facit homicidium.* And herewith agreeth Fleta: and herein the law is grounded upon the law of God, which ſaith, *Quicunque effuderit humanum ſanguinem, fundetur ſanguis illius, ad imaginem quippe Dei creatus eſt homo.* If a man counſell a woman to kill the childe within her wombe, when it ſhall be born, and after ſhe is delivered of the childe, ſhe killeth it; the councellor is an acceſſory to the murder, and yet at the time of the commandement, or councell, no murder could be committed of the childe *in utero matris*: the reaſon of which caſe proveth well the other caſe.

Malice prepenſed.] Firſt let us ſee what this malice is.

Malice prepenſed is, when one compaſſeth to kill, wound, or beat another, and doth it *ſedato animo.* This is ſaid in law to be malice forethought, prepenſed, *malitia præcogitata.* This malice is ſo odious in law, as though it be intended againſt one, it ſhall be extended towards another. * *Si quis unum percuſſerit, cum alium percutere vellet, in felonia tenetur.*

Mandata recipiunt ſtrictam interpretationem, ſed illicita latam et extenſivam. But herein there is a diverſity between the principall and the acceſſory. For if A command B, to kill C, and B by miſtaking killeth D in ſtead of C, this is murder in B becauſe he did the act: and it ſprang out of the root of malice, and the law ſhall couple the event to the cauſe: but A is not acceſſory, becauſe his commandement was not purſued; and his conſent, which muſt make him acceſſory, cannot be drawne to it, for he never commanded the death of D. But where death enſueth upon that act which is commanded,

[a] Chro. de Dunſtable, Holl. 252. Coram Juſtic. Itiner. in Com. Kanc. 18 E. 1. See the ſecond part of the Inſt. cap. Stat. de Judaiſmo.

[b] 22 E. 3. Coron. 263. 8 E. 2. Cor. 418. Stan. p. cor. 21. c.

[c] 1 E. 3. 23, 24. 3 Aſſ. p. 2.

[d] Bract. li. 3. f. 21. Fleta, lib. ca. 23.

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Geneſis, c. 6. v. 6.

Dier. 3. Eliz. fol. 186.

Dier. 3 Mar. 128. Pl. Com. 474, 475, 476. Lib. 9. fol. 81. Agnes Gores caſe.

* Bracton, lib. 3. fol. 155.

commanded, though death it ſelfe be not commanded, there he is acceſſory to it, for there the commandement is the cauſe of death. As if A command B to beat C, and he beat him, whereof he dieth: the commander is acceſſory, and therefore the diverſity is apparent, as to the acceſſory. Where death is purſuant, and followeth upon the act commanded, there the conſent of the commander may well be drawn to it, for that the commandement is the mean of the death. But where death enſueth upon another diſtinct cauſe, there the conſent of the acceſſory cannot be drawn to it, *et ſic de cæteris.*

Another diverſity there is, when the commandement extends expreſly to the killing of another, and for the better accompliſhment thereof preſcribeth a mean; that is, to kill him by poyſon, and he killeth him with a gun, he is acceſſory: for the commandement was to kill, which enſued, though the mean was not followed, *et finis rei attendendus eſt.* And the ſubſtance of the commandement, viz. [to kill] is purſued: and the ſame offence that was commanded, is committed. But otherwiſe it is, if the ſame offence which is commanded be not committed. As if one command one to rob the vintners man of plate, as he is to come to a gentlemans chamber to his ſupper with wine; and he breaketh the taverne in the night, and ſtealeth the plate there; the commander is not acceſſory to this burglary, for this is another offence then he commanded, and the conſent of the acceſſory muſt be drawn to the murder or felony committed.

2. It muſt be malice continuing untill the mortall wound, or the like be given. Albeit there had been malice between two, and after they are pacified and made friends, and after this upon a new occaſion fall out, and the one killeth the other; this is homicide, but no murder, becauſe the former malice continued not.

If A command B to kill C, and before the act be done, A repenteth and countermand his commandement, and charge B not to do it: if B after killeth him, A is not acceſſory to it: for the malicious minde of the acceſſory ought to continue to do ill untill the act done. Pl. Com. ubi ſup.

If two fall out upon a ſudden occaſion, and agree to fight in ſuch a field, and each of them go and fetch their weapon, and go into the field, and therein fight, the one killeth the other: here is no malice prepenſed, for the fetching of the weapon and going into the field, is but a continuance of the ſudden falling out, and the blood was never cooled. But if they appoint to fight the next day, that is malice prepenſed.

Malice implyed, is in three caſes.] Firſt, in reſpect of the manner of the deed. As if one killeth another without any provocation of the part of him, that is ſlain, the law implieth malice: whereof you may read lib. 9. fol. 67. Mackallyes caſe. Alſo the poyſoning of any man, whereof he dieth within the year, implieth malice, and is adjudged wilfull murder of malice prepenſed. One may be poyſoned four manner of ways: *guſtu* by taſte, that is by eating, or drinking, being infuſed into his meat or drink: *anhelitu*, by taking in of breath, as by a poyſonous perfume in a chamber, or other room: 3. *contactu*, by touching: and laſtly, *ſuppoſitu*, as by a glyſter or the like. Now for the better finding out of this horrible offence, there be divers kindes of poyſons, as the powder of diamonds, [52]

Lib. 9. fo. 67. b. in Mackallies caſe. 1 E. 6. c. 12.

diamonds, the powder of ſpiders, *lapis cauſticus*, (the chief ingredient whereof is ſoap) cantharides, mercury ſublimate, arſenick, roſeacre, &c.

Lib. 9. fo. 68.

2. In reſpect of the perſon ſlain. As if a magiſtrate or known officer, or any other, that hath lawfull warrant, and in doing, or offering to doe his office, or to execute his warrant, is ſlain, this is murder, by malice implied by law, as the ſherif, juſtice of the peace, underſherif, chief conſtable, petit conſtable, or any other miniſter of the king. If a man kill a watchman doing his office, it is murder: ſo it is, if any, that come in aid of the kings officer, &c. to doe his office, be ſlain, it is murder.

Mackallies caſe. Ubi ſupra. Lib. 4. fo. 40. b. 41. a. Youngs caſe.

3. In reſpect of the perſon killing. If A aſſault B to rob him and in reſiſting A killeth B this is murder by malice implied, albeit he never ſaw or knew him before. If a priſoner by the dures of the gaoler, commeth to untimely death, this is murder in the gaoler, and the law implieth malice in reſpect of the cruelty. And this is the cauſe, that if any man dieth in priſon, the coroner ought to ſit upon his body, to the end it may be inquired of, whether he came to his death by the dures of the gaoler, or otherwiſe: all which appeareth in Britton: and this ſitting of the coroner continueth till this day.

Mackallies caſe. Ubi ſupra.

Brit. ca. 11. De priſons fo. 18. a. See the Mirror cap. 2. §. 11. De homicide. 5 H. 6. 58. 27 Aſſ. p. 41.

If the ſherif, or other officer, where he ought to hang the party attainted, according to his judgement and his charge, will againſt the law, of his own wrong, burn or behead him, or *è converſo*; the law in this caſe implieth malice in him. Neither can the king by any warrant under the great ſeal alter the execution, otherwiſe then the judgement of law doth direct: for it is a maxime in law, *non alio modo puniatur quis, quam ſecundum quod ſe habeat condemnatio.*

Bract. l. 3. fo. 104.

And it is to be known, that in caſe of treaſon and felony, there is an expreſſe judgement, and an implied judgement: expreſſe, when upon appearance, &c. an expreſſe judgement is given againſt him, *quòd ſuſpendatur per collum.* Implied, when the offender makes default, and is outlawed, where the judgement is, *ideo utlagetur*; or in caſe of abjuration, *quia abjuravit regnum*: and yet the like execution ſhall be in caſe of outlawry or abjuration, as in caſe of an expreſſe judgement: and ſo it was adjudged in caſe of a perſon outlawed for felony, he ought to be hanged untill he be dead, and cannot be beheaded, * and the like is in caſe of abjuration. But in caſe of high treaſon, becauſe beheading is parcell of the judgement, the king may pardon all the reſidue of the execution except that: for ſeeing the king may pardon the whole execution, he may pardon any part, or all, ſaving part. If a lieutenant, or other that hath commiſſion of marſhall authority, in time of peace hang, or otherwiſe execute any man by colour of marſhall law, this is murder, for this is againſt Magna Charta, cap. 29. and is done with ſuch power and ſtrength, as the party cannot defend himſelf; and here the law implieth malice. *Vide* Paſch. 14. E. 3. in Scaccario the abbot of Ramſeys caſe in a writ of error in part abridged by Fitzh. tit. Scire fac. 122. for time of peace.

See hereafter in the title of Sanctuary for Abjuration. Paſch. 20 R. 2. Coram Rege Linc. Ro. 58. * Mich. 1 R. 2. Coram Rege. Rot. 1. Bedf. See hereafter cap. Judgement and Execution.

[a] Thom. countee de Lancaſter being taken in an open inſurrection, was by judgement of marſhall law put to death, in *anno* 14 E. 4. This was adjudged to be unlawfull, *eò quòd non fuit arrainiatus*,

[a] Paſch. 39 E. 3. Coram Rege Rot. 92. Wiltes. Simile Paſch. 28 E 3. Coram Rege Rot. 37. In caſe de Mortimer, who was put to death anno 1 E. 3. Vide Rot. Brevium anno 1 E. 3. part. 1.

rainiatur, ſeu ad reſponſionem poſitus tempore pacis, eò quòd cancellaria, et aliæ curiæ regis fuerunt tunc apertæ, in quibus lex fiebat unicuique, prout fieri conſuevit, quòd contra cartam de libertatibus cum dictus Thomas fuit unus parium et magnatum regni non impriſonetur, &c. Nec dictus rex ſuper eum ibit, nec ſuper eum mittet, niſi per legale judicium parium ſuorum, &c. tamen tempore pacis abſque arraniamento, ſeu reſponſione, ſeu legali judicio parium ſuorum, &c. adjudicatus eſt morti. [53]

Within a year and a day.] How this year and a day ſhall be accounted, is to be ſeen. If the ſtroke, or poyſon, &c. be given the firſt day of January, the year ſhall end the laſt day of December: for though the ſtroke, or poyſon, &c. were given in the afternoon of the firſt day of January, yet that ſhall be accounted a whole day, for regularly the law maketh no fraction of a day: and the day was added, that there might be a whole year at the leaſt after the ſtroke, or poyſon, &c. for if he die after that time, it cannot be diſcerned, as the law preſumes, whether he died of the ſtroke or poyſon, &c. or of a natural death; and in caſe of life the rule of law ought to be certain. But ſeeing the year and day in the caſe of murder and homicide, muſt be accounted *apres le fait*, after the deed, if a man be ſtricken or poyſoned, &c. the firſt of January, and he dieth of that ſtroke or poyſon the firſt day of May, whether ſhall the year and day be accounted after the ſtroke or poyſon given, or after the death? and it ſhall be accounted after the death, for then the man was murdered, and not after the ſtroke or poyſon given, &c. both in the indictment at the ſuit of the king, and in the appeal at the ſuit of the party. And ſo it hath been often adjudged contrary to the opinion of juſtice Stanford. A murderer half a year after the murder is received, and aided by another, this acceſſory may be indicted or appealed within the year after he became acceſſory, though it be after the year, that the murder was committed, and ſhall be tryed when the principall is attainted.

See the ſtatute of Glouceſt. 6 E. 1. ca. 9. 3 H. 7. ca. 1. 3 E. 3. Cor. 303. Lib. 5. fo. 1. in Cleytons caſe.

Lib. 4. fo. 41, 42. in Heydons caſe.

Stanf. Pl. Cor. 63. 26 Aſſ. p. 52.

If a murder be committed in the day time in a town not incloſed, and the murderer not apprehended, the townſhip ſhall be amerced, but if incloſed, whether the murder be in the night, or day, the town ſhall be amerced. They that are preſent when any man is ſlain, and doe not their beſt indeavour to apprehend the murderer, or manſlayer ſhal be fined and impriſoned. What judgment a felon attainted ſhall have, and what he ſhall forfeit; ſee the firſt part of the Inſtitutes, ſect. 747. and here, cap. Judgement and Execution.

3 H. 7. c. 1. ſtat. 1. 3 E. 3. cor. 299. 8 E. 2. cor. 39. Inter leges regis Edw. cap. 6. Æthelſtani cap. 1. Ed. cap. 6. &c.

* Nota that before the reign of H. 1. the judgement for felony was not always one, but king H. 1. ordained by parliament, that the judgement for all manner of felonies ſhould be, that the perſon attainted ſhould be hanged by the neck till he be dead, which continueth to this day. See more for murder in the chapter of Monomachia.

* 9 H. 1. Hovanden, anno 1108. Simon Dun. Rad. and Floren. Wigorn. Hollengſh. 45.

CAP. VIII.

OF HOMICIDE.

HOMICIDIUM ex vi termini comprehendeth petit treaſon, murder, and that which is commonly called manſlaughter: for *homicidium eſt hominis cædium*, and *homicidium eſt hominis occiſio ab homine facta*. Therefore the right diviſion of homicide is: that of homicides, or manſlaughter, ſome be voluntary, and of malice forethought; as petit treaſon, and murder of another, and murder of himſelf. Of the two former we have ſpoken; and of murder of himſelf we ſhall ſpeak hereafter. Of manſlaughters, ſome be voluntary, and not of malice forethought: of theſe ſome be felony (as ſhall be ſhewed hereafter) and ſome be no felony; of which, ſome be in reſpect of giving back inevitably in defençe of himſelf, upon an aſſault of revenge: and ſome without any giving back; as upon the aſſault of a thief or robber upon a man in his houſe, or abroad: Some upon the aſſault of one, that is under cuſtody; as the ſherif, or gaoler aſſaulted by his priſoner. Some in reſpect that he is an officer or miniſter of juſtice, without any aſſault in execution of his office, or lawfull warrant. And laſtly, ſome homicides, that be no felony, be neither forethought, nor voluntary; as manſlaughter by miſadventure, *per infortunium*, or *caſu*. And ſome of theſe, that be no felony, are cauſes of forfeiture of a man's goods, and ſome be not: and of theſe ſeveral branches in their order. And firſt of murder of a man's ſelf, who commonly is called *felo de ſe*.

3 E. 3. cor. 290. 289. 312.

Britton cap. 7.

Felo de ſe.

Felo de ſe is a man, or woman, which being *compos mentis*, of ſound memory, and of the age of diſcretion, killeth himſelf, which being lawfully found by the oath of twelve men, all the goods and chattels of the party ſo offending are forfeited.

Regula.

Now let us peruſe the ſeverall branches of this deſcription, *majus eſt delictum ſeipſum occidere, quam alium.*

[a] Rot. Clauſ. 1 E. 1. m. 7. Rot. Clauſ. 6 E. 1. Alma filia Roberti de Keſton. 3 E. 3. cor. 324. Rot. Eicheat. anno 47 E. 3. nu. 17. Ricus Algate.

Being compos mentis.] [a] If a man loſe his memory by the rage of ſickneſs or infirmity, or otherwiſe, and kill himſelf while he is not *compos mentis*, he is not *felo de ſe*: for, as he cannot commit murder upon another, ſo in that caſe he cannot commit murder upon himſelf. [b] If one during the time that he is *non compos mentis* give himſelf a mortall wound, whereof he, when he hath recovered his memory, dieth, he is not *felo de ſe*: becauſe, the ſtroke which was the cauſe of his death, was given when he was not *compos mentis*: *et actus non facit reum, niſi mens ſit rea.* If a man give himſelf a wound, intending to be *felo de ſe*, and dieth not within the year and day after the wound, he is not *felo de ſe*.

[b] 8 E. 2. cor. 412. 22 E. 3. cor. 244. Pl. Com. 260.

Of the age of diſcretion.] Hereof we have ſpoken before treating of murder.

[c] 44 E. 3. 44. 3 E 3. cor. 286. & 297.

Kill himſelf.] [c] And this is often voluntary, and ſometime not voluntary. If A. give B. ſuch a ſtroke as he felleth him to the ground, B. draweth his knife, and holds it up for his own defence:

fence: A. in haſt meaning to fall upon B. to kill him, falleth upon the knife of B. whereby he is wounded to death, he is *felo de ſe*: for B. did nothing but that which was lawfull in his own defence.

Lawfully found.] [d] No goods be forfeited, untill it be lawfully found by the oath of twelve men, that he is *felo de ſe*: and this doth belong to the coroner *ſuper viſum corporis*, to inquire thereof: and if it be found before the coroner *ſuper viſum corporis*, that he was *felo de ſe*, [a] the executors or adminiſtrators of the dead ſhall have no traverſe thereunto. And this is the reaſon, that no man can preſcribe to have felons goods, becauſe they are not forfeited, until it be found of record, that he is *felo de ſe*.

[d] Pl. Com. 360. b.

[55]

[a] Stanf. pl. cor. 183. d.

[b] If a man be *felo de ſe*, and is caſt into the ſea, or otherwiſe ſo ſecretly hidden, as the coroner cannot have the view of the body, and by conſequence cannot inquire thereof: in this caſe it may be inquired thereof by the juſtices of peace of that county; for they have power by their commiſſion to inquire of all felonies. But if it be found before them, the executors or adminiſtrators of the dead may have a traverſe thereunto, but not to the indictment taken before the coroner *ſuper viſum corporis*, as before is ſaid: and ſo hath it been reſolved. And ſo in the caſe aboveſaid may the kings bench enquire thereof, if the felony be committed in the county where the kings bench ſit, and the executors or adminiſtrators of the dead may traverſe the ſame.

[b] Hil. 37 Eliz. in the kings bench by the whole court, in the caſe of one Laughton of Cheſhire. See 8 E. 2. cor. 412. 3 E. 3. cor. 312. Ble. Stanf. pl. cor. 184.

Are forfeited.] Albeit [c] Bracton was of opinion, that if a man that was *reus alicujus criminis captus ſit pro eodem, utpote pro morte hominis, vel cum furto manifeſto, vel quod utlegatus ſit, et metu pœnæ imminentis mortis mortem ſibi conſciverit, hæredem non habebit, quia ſic convincitur felonia prius facta*, viz. *furtum, mors hominis, vel hujuſmodi, et conſcientiæ metus in reo pro confeſſo habetur. Aliud erit ſi non ſit in crimine deprehenſus, &c. non debet in aliquo caſu exhæredatio fieri, niſi præcedat crimen, propter quod periculum mortis vel membrorum ſuſtineri debet, &c.* But the law makes no ſuch diverſity: [d] for *felo de ſe*, whatſoever offence he hath committed (whereof he was not in his life time attainted) ſhall forfeit no lands, but his goods and chattels only. [e] And ſo ſaith Britton, *En caſe ou home eſt felon de ſoy meſme, ſoient ſes chateux judges nous come chateux de felon, le heritage ne quident remaiſt as heires.* For no man can forfeit his land without an attainder by courſe of law.

[c] 8 E. 2. cor. 426. 44 E. 3. 44. 22 E. 3. cor. 259. 3 E. 3. cor. 301. 3 E. 3. 3. cor. 362. 5 Mar. Dier. 160. 9 Eliz. Dier. 262. Bract. lib. 3. f. 150. Fleta, lib. 2. c. 34.

[d] Pl. com. 261. a. & b. per touts les juſtices.

[e] Britton, cap. 7. Cuſtum. de Norm. cap. 21.

A [f] villain giveth himſelfe a mortall wound, the lord ſeiſeth his goods, the villain after dieth of the wound within the year and the day, the goods are forfeit.

[f] Pl. com. 260. b.

And herein [g] there is a diverſity between chattels perſonels in action, and in poſſeſſion: for if a debt be owing to two, unleſſe it be in caſe of two joint merchants, and the one is *felo de ſe*, he doth forfeit the whole: but otherwiſe it is of goods in poſſeſſion, for there he forfeiteth but his part.

[g] 8 E. 4. 4. Pl. com. 259. b.

A leaſe [h] is made for years to the huſband and wife, the huſband drowneth himſelf, the leaſe is forfeited, as you may read at large in Plowdens Commentaries.

[h] Pl. com. 260. Dier, 2 Mar. 108.

Now let us purſue the branches into which bloody homicide did ſpend and empty itſelfe.

Some manſlaughters be voluntary, and not of malice forethought, upon ſome ſudden falling out. *Delinquens per iram provocatus*

vocatus puniri debet mitius. And this for diſtinction ſake is called manſlaughter. There is no difference between murder, and manſlaughter; but that the one is upon malice forethought, and the other upon a ſudden occaſion: and therefore is called chance-medley. As if two meet together, and ſtriving for the wall the one kill the other, this is manſlaughter and felony. And ſo it is, if they had upon that ſudden occaſion gone into the fields and fought, and the one had killed the other: this (as hath been ſaid) had been but manſlaughter, and no murder; becauſe all that followed, was but a continuance of the firſt ſudden occaſion, and the heat of the blood kindled by ire was never cooled, till the blow was given, *et ſic de ſimilibus.*

[l] Lib. 4. fol. 44. Bibithes caſe

Manſlaughter [l] is felony, and hereof there may be acceſſories after the fact done: but of murder, there may be acceſſories, as well before, as after the fact.

[k] 15 E. 3. cor. 116. 15 Aſſ. p. 7. 43 Aſſ. 31. See the ſtat. of Gloc. cap. 39. 3 E. 3. cor. 184. 286. & 297. 305. & 361. See hereafter, ca. 101. of Judgement and Execution. Verb. Of death of a man ſe defendendo.

Some be [k] voluntary, and yet being done upon an inevitable cauſe are no felony. As if A. be aſſaulted by B. and they fight together, and before any mortall blow given A. giveth back, untill he commeth unto a hedge, wall, or other ſtrait, beyond * which he cannot paſſe, and then in his own defence, and for ſafeguard of his owne life killeth the other: this is voluntary, and yet no felony, and the jury that finde, it was done *ſe defendendo*, ought to finde the ſpeciall matter. [a] And yet ſuch a precious regard the law hath of the life of man, though the cauſe was inevitable, [b] that at the common law he ſhould have ſuffered death: and though the ſtatute of Gloceſter ſave his life, yet he ſhall forfeit all his goods and chattels. [c] Hereof there can be no acceſſories, either before or after the fact, becauſe it is not done *felleo animo*, but upon inevitable neceſſity *ſe defendendo*. If A. aſſault B. ſo fiercely and violently, and in ſuch a place, and in ſuch manner, as if B. ſhould give back, he ſhould be in danger of his life, he may in this caſe defend himſelfe; and if in that defence he killeth A, it is *ſe defendendo*, becauſe it is not done *felleo animo:* for the rule is, when he doth it in his own defence, upon any inevitable cauſe, *Quod quis ob tutelam corporis ſui fecerit, jure id feciſſe videtur.*

* [56]

[a] 43 Aſſ. 31. Rot. Parl. 3 R. 2. nu. 18. John Imperials caſe.

[b] 21 E. 3. 17. Gloc. cap. 9. 4 H. 7. 2.

[c] Lib. 4. fo. 44. Bibiths caſe. Bracton.

Some without any giving back to a wall, &c. or other inevitable cauſe. [d] As if a thiefe offer to rob or murder B. either abroad, or in his houſe, and thereupon aſſault him, and B. defend himſelfe without any giving back, and in his defence killeth the thief, this is no felony; for a man ſhall never give way to a thief, &c. neither ſhall he forfeit any thing. [e] And ſo it is declared by the ſtatute of 24 H. 8. Likewiſe [f] if a priſoner aſſault the gaoler, the gaoler is not by law inforced to give back: but if in defence of himſelfe he kill the priſoner, this is no felony.

[d] Lib. 5. fo. 91. Semayns caſe. 26 Aſſ. p. 23. 32. 29 Aſſ. p. 23. 3 E. 3. cor. 305. & 330. 22 E. 3. cor. 261. 21 H. 7. 39.

[e] 24 H. 8. cap. 5.

[f] 22 Aſſ. p. 55.

[g] So if any officer, or miniſter of juſtice, that hath lawfull warrant, and the party aſſault the officer or miniſter of juſtice, he is not bound by law to give back, but to carry him away: and if in execution of his office he cannot otherwiſe avoid it, but in ſtriving kill him, it is no felony. And in that caſe the officer or miniſter of juſtice ſhall forfeit nothing, but the party ſo aſſaulting or offering to flye away, and is killed, ſhall forfeit his goods and chattels.

[g] 3 E. 3. cor. 290. 22 E. 3. cor. 261. M. 22 E. 3. coram rege Rot. 181. Eborum. Rot. Eberr. anno 1 & 2 E. 1. m. 2.

[h] *Vicecomes ſeu baliivus domini regis, qui interfecit duos latrones non permittentes*

[h] Paſch. 16 E. 3. Coram rege. Rot. 131. Norff.

permittentes ſe juſticiari in ſui defenſionem, et non ex felonia, ſeu malitia, acquietatur.

[1] If at a juſt or turnement, or at the play with ſword and buckler by the kings commandement, one doth kill another, this is no felony. [k] In the reigne of king H. 2. it was enacted, that if in ſuch caſe one was ſlaine, it ſhould be no felony, for that in friendly manner they contended to try their ſtrength, and to be able to doe the king ſervice in that kinde, as occaſion ſhould be offered.

[1] 11 H. 7. 22. Vid. hereafter. cap. Againſt riding and going armed.

[k] Mirror, cap. 1. § 13. Des adventures.

There is an homicide, that is neither forethought, nor voluntary. [l] As if a man kill another *per infortunium, ſeu caſu*, that is homicide by miſadventure. *De amputatore arborum, qui cum ramum projicerét, inſcius occidit tranſeuntem: aut cum quis pilam percuſſerit, &c. ex cujus ictu occiſus eſt, tales de homicidio non tenentur.* Homicide by miſadventure, is when a man doth an act, that is not unlawfull, which without any evill intent tendeth to a man's death.

[l] Bract. lib. 3. fo. 136. b. See the ſtat. of Gloc. ca. 9. Marl. cap. 25. Bract. lib. 3. 120. Brit. ca. 7. fo. 15. Fleta, lib. 1. ca. 30. Mir. ca. 1. § 9.

Unlawfull.] [m] If the act be unlawful it is murder. As if A. meaning to ſteale a deere in the park of B, ſhooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a buſh: this is murder, for that the act was unlawfull, although A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had ſhot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by miſadventure, and no felony.

[m] Bract. lib. 3. 120. b. Sed erit diſtinguendum utrum quis dederit operam rei licitæ vel illicitæ, &c.

[n] So if one ſhoot at any wild fowle upon a tree, and the arrow killeth any reaſonable creature afar off, without any evill intent in him, this is *per infortunium:* for it was not unlawful to ſhoot at the wilde fowle: but if he had ſhot at a cock or hen, or any tame fowle of another mans, and the arrow by miſchance had killed a man, this had been murder, for the act was unlawfull,

[n] 3 E. 3. cor. 354. 2 H. 4. 18. 11 H. 7. 23. a.

Without any evil intent.] If a man knowing that many people come in the ſtreet from a ſermon, throw a ſtone over a wall, intending only to feare them, or to give them a light hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death, and though he knew not the party ſlaine. For the killing of any by miſadventure, or by chance, albeit it be not felony, *quia voluntas in delictis, non exitus ſpectatur*; yet he ſhall forfeit therefore all his goods and chattels, to the intent that men ſhould be wary ſo to direct their actions, as they tend not to the effuſion of mans blood,

[57]

Marlbr. ca. 25.

Nec veniam effuſo ſanguine caſus habet.

Nota, Homicide is called chancemedley, or chancemelle, for that it is done by chance (without premeditation) upon a ſudden brawle, ſhuffling, or contention; for meddle or melle (as ſome ſay) is an ancient French word, and ſignifieth brawle, or contention. But I take it that the French word is *meſle*, which ſignifying ſhuffling or contending, and by corruption we changing the S to D, doe call it *medle*, the S being not pronounced, whereof we have made *medletum*. So as killing of a man by chance-medle, is killing of a man upon a ſudden brawle or contention by chance, for the word [*medle* or *melle*,] whereof we have made a Latin word *medletum or melletum*, ſee Glanvill, lib, 1. cap. 2. *cognoſcere de medletis, de verberibus, de plagis:* that is, of brawling, or brabling, of battery,

De Medletis.

battery, of wounding: the firſt in words, the other two in ſtrokes, &c. in ancient time expreſſed by theſe two Saxon words, viz. *flit*, a *flitan*, to brawle; and *filt*, which we retaine ſtill to ſight when it proceeds to blowes. *Unde flitwit, flichwite, fightwite, &c.*

And thus much of homicide committed by man. See in the next chapter of deodands, of another kinde of killing of a man.

CAP. IX.

OF DEODANDS.

DEODANDS when any [a] moveable thing inanimate, or [b] beaſt animate, doe move to, or cauſe the untimely death of any reaſonable creature by miſchance [c] in any county of the realm (and not upon the ſea, or upon any ſalt water) without the will, offence, or fault of himſelf, or of any perſon. [d] They being ſo found by lawful inquiſition of twelve men, being *precium ſanguinis*, the price of blood, are forfeited to God, that is to the king, Gods lieutenant on earth, to be diſtributed in works of charity for the appeaſing of Gods wrath.

And it is to be obſerved, that there is a diverſity, as concerning the deodand, when the party ſlain is within the age of diſcretion, viz of 14. years, and when he is above the age of diſcretion. For when he is ſlain by fall from a cart, horſe, mill, &c. and is within the age of diſcretion there is no deodand, as it is adjudged [e] in 8 E. 2. tit. coron. 389. But otherwiſe it is, if an oxe, horſe, bull, or the like, doe kill any within the age of diſcretion, there the ſame are deodands.

And this law concerning deodands, is grounded upon the law of God, Exodus 2. verſ. 28. *Si bos cornu percuſſerit virum, aut mulierem, et mortui fuerint, lapidibus obruetur.* See juſtice Stanford, lib. 1. cap. 12. which need not here to be recited. If A. killeth a man with the ſword of B. the ſword ſhall be forfeit to the king * as a deodand, becauſe *movet ad mortem*, and for default of ſafe keeping of the ſame by the owner.

But now that we have cited, and referred you to our books of law already known, and publiſhed: let us caſt our eye upon ſome records of parliament concerning deodands, of, or out of ſhips or other veſſels upon rivers, or waters, freſh or ſalt, the law being clear that in *aqua dulci* there may be deodands, but in the ſea, or in *aqua ſalſa*, being any arm of the ſea, though it be in the body of the county, there can be no deodand of the ſhip, or any part thereof, though any be drowned out of it; becauſe, though the arm of the ſea be within the body of the county, the ſhip or other veſſel is ſubject to ſuch dangers upon the raging waves in reſpect of the wind and tempeſt. And this diverſity doth notably appear in the parliament roll. Amongſt the petitions in parliament it is deſired, that if it happen any man, or boy to be drowned by a fall out of any ſhip, boat, or veſſel, they ſhall be no deodands. Whereunto the king upon great advice, and conference with his judges and councell

[a] 8 E. 2. Cor. 403 8 E. 2. Ibid. 389. A mill wheel. Fleta lib. 1. ca. 25. quicquid mobile ſit in molendino. Mirror c. 1. § 13. 12 R. 2. Cor. 20. a maſſe of earth in a mine.

[b] Bract. lib. 3. fo. 120. b. A bove, cane, &c.

[c] Bracton, lib. 3. fo. 122. a. Britton, fo. 6. 15. Mirror, cap. 1. § 3. Fleta, li. 1 ca. 25. 45 E. 3. 2. b. Vide 4 E. 1. ſtat. officium coron. 6 E. 6. Dier, 77. b. 61. a. Quæ movent ad mortem ſunt Deo danda. 2 Mar. ibid. 107. b. Kelway, 21 H. 7. fo. 8.

[d] Lib. 5. fo. 110. b. Foxleys caſe accord. And this is the reaſon they cannot be claimed by preſcription. 45 E. 3. ubi ſupra. Fleta ubi ſup.

[e] 8 E. 2. cor. 389.

[f] Exod. 2. 28.

*[58]

Doct. & Stud. lib. 2. 156. b. Br. Forfeit. 172. All our ancient authors ubi ſupra Rot. Parl. 51 E. 3. nu. 73.

councell learned (as always the king doth to petitions in parliament) made anſwer, The ſhip, boat, or veſſel being upon * the ſea ſhall be adjudged no deodand, but being upon a freſh river, it is a deodand, but the king will ſhew favour.

* The arm of the ſea is included herein.

See the like petitions in other rolls of parliament *anno* 1 R. 2. nu. 106. 4 R. 2. nu. 33. 1 H. 5. nu. 35. &c. but never obtained more, then the common law gave in theſe caſes.

CAP. X.

Of BUGGERY, or SODOMY.

IF any perſon ſhall commit buggery with mankind, or beaſt; by authority of parliament this offence is adjudged felony without benefit of clergy. But it is to be known, (that I may obſerve it once for all) that the ſtatute of 25 H. 8. was repealed by the ſtatute of 1 Mar. whereby all offences made felony or premunire by any act of parliament made ſince 1 H. 8. were generally repealed, but 25 H. 8. is revived by 5 Eliz.

25 H. 8. ca. 6. 5 Eliz. ca. 17. 1 Mar. ubi ſup.

Buggery is a deteſtable, and abominable ſin, amongſt chriſtians not to be named, committed by carnal knowledge againſt the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beaſt, or by womankind with bruite beaſt.

Horrendum illud peccatum. 5 El. ca. 17.

Bugeria is an Italian word, and ſignifies ſo much, as is before deſcribed, *pæderaſtes* or *paidereſtes* is a Greek word, *amator puerorum*, which is but a ſpecies of buggery, and it was complained of in parliament, that the Lumbards had brought into the realm the ſhamefull ſin of ſodomy, that is not to be named, as there it is ſaid. Our ancient authors doe conclude, that it deſerveth death, *ultimum ſupplicium*, though they differ in the manner of the puniſhment: Britton ſaith, that ſodomites, and miſcreants ſhall be burnt, and ſo were the ſodomites by Almighty God. Fleta ſaith, *pecorantes et ſodomitæ in terra vivi confodiantur*: and therewith agreeth the Mirror, *pur le grand abhomination*, and in another place he ſaith, *Sodomie eſt crime de majeſtie, vers le roy celeſtre*. But (to ſay it once for all) the judgement in all caſes of felony, is, that the perſon attainted be hanged by the neck, untill he, or ſhe be dead. But in ancient times, in that caſe, the man was hanged, and the woman was drowned, whereof we have ſeen examples in the reign of R. 1. And this is the meaning of ancient franchiſes granted *de furca, et foſſa*, of the gallows, and the pit, for the hanging upon the one, and drowning in the other, but *foſſa* is taken away, and *furca* remains.

Rot. Parl. 50 E. 3. nu. 58.

Britton ca. 9. Gen. 19. 9. Rom. ca. 1. 17. F. N. B. 269. a. Fleta li. 1. ca. 37. Mirror ca. 4. §. de majeſty, ca. 1. § 15. & cap. 2. ſect. 11.

Cum maſculo non commiſcearis coitu fœmineo, quia abominatio eſt. Cum omni pecore non coibis, nec maculaberis cum eo: mulier non ſuccumbet jumento, nec miſcebitur ei, quia ſcelus eſt, &c.

[59]

Levit. 18. 22, 23. 1 Tim. 1. 10.

The act of 25 H. 8. hath adjudged it felony, and therefore the judgement for felony doth now belong to this offence, viz. to be hanged by the neck till he be dead. He that readeth the preamble

of this act, ſhall find how neceſſary the reading of our ancient authors is: the ſtatute doth take away the benefit of clergy from the delinquent. But now let us peruſe the words of the ſaid deſcription of buggery.

Deteſtable and abominable.] Thoſe juſt attributes are found in the act of 25 H. 8.

Amongſt Chriſtians not to be named.] Theſe words are in the uſuall indictment of this offence, and are in effect in the parliament roll of 50 E. 3. *ubi ſupra*, nu. 58.

By carnall knowledge, &c.] The words of the indictment be, *contra ordinationem creatoris, et naturæ ordinem, rem habuit veneream, dictumque puerum carnaliter* * *cognovit, &c.* So as there muſt be *penetratio*, that is, *res in re*, either with mankind, or with beaſt, but the leaſt penetration maketh it carnall knowledge. [a] See the indictment of Stafford, which was drawn by great advice for committing buggery with a boy, for which he was attainted and hanged.

[b] The ſodomites came to this abomination by four means, viz. by pride, exceſſe of diet, idleneſſe, and contempt of the poor. *Otioſus nihil cogitat, niſi de ventre et venere.* Both the agent and conſentient are felons: and this is conſonant to the law of God. [c] *Qui dormierit cum maſculo coitu fœmineo, uterque operatus eſt nefas, et morte moriatur.* And this accordeth with the ancient rule of law, *agentes et conſentientes pari pœna plectentur.*

Emiſſio ſeminis maketh it not buggery, but is an evidence in caſe of buggery of penetration: and ſo in rape the words be alſo, *carnaliter cognovit*, and therefore there muſt be penetration; and *emiſſio ſeminis* without penetration maketh no rape. *Vide* in the chapter of Rape. If the party buggered be within the age of diſcretion, it is no felony in him, but in the agent only. When any offence is felony either by the common law, or by ſtatute, all acceſſories both before and after, are incidently included. [d] So if any be preſent, abetting and aiding any to do the act, though the offence be perſonall, and to be done by one only, as to commit rape, not only he that doth the act is a principall, [e] but alſo they that he preſent, abetting, and aiding the miſdoer, are principalls alſo, which is a proof of the other caſe of Sodomy.

Or by woman.] This is within the purvien of this act of 25 H. 8. For the words be, if any perſon, &c. which extend as well to a woman, as to a man, and therefore if ſhe commit buggery with a beaſt, ſhe is a perſon that commits buggery with a beaſt, to which end this word [perſon] was uſed. And the rather, for that ſomewhat before the making of this act, a great lady had committed buggery with a baboon, and conceived by it, &c.

There be four ſins in holy ſcripture called *clamantia peccata*, crying ſins, whereof this deteſtable ſin is one, expreſſed in this diſtichon.

Sunt vox clamorum, vox ſanguinis, et ſodomorum,
Vox oppreſſorum, merces detenta laborum.

* This is grounded upon the word of God. viz. Gen. 19. 4, 5. Judges, 19. 22. Ut cognoſcamus eos.

[a] Cake lib. Intr. 352. Mich. 5 Jac. Cram rege.

[b] Ezek. 16. 49. Gen. 18. 29. Deut. 29 23. Eſay, 13. 19. Jer. 23. 14. 49. 18. 50. 4. Luke, 17. 28, 29. 2 Pet. 2. 6. Jud. verſ. 7. Rom. 1. 26, 27. Sapient. 10. 6, 7.

[c] Levit. 20. 13. 1 Cor. c. 6. v. 10.

[d] 3 & 4 P. & Mar juſtice Daliſons Reports. Stanf. Pl. cor. Pl. com. 97.

[e] 11 H. 4. 13. See the 2. part of the Inſtitutes in the expoſition upon the ſtatute o. W. 1. ca. 13. and W. 2. ca. 34.

CAP. XI.

OF RAPE.

RAPE is felony by the common law, declared by parliament for the unlawfull and carnall knowledge and abuſe of any woman above the age of ten years againſt her will, or of a woman child under the age of ten years with her will, or againſt her will, and the offender ſhall not have the benefit of clergy. Deut. 22. 25. Inter leges Alveredi, cap. 25. Canuti 49, 50. See W. 2. c. 34. W. 1. ca. 13. Rot. Parl. 8. E. 2. & Rot. Claus. 8 E. 2. m. 3.

What offence this was at the common law, and what acts of parliament have been enacted concerning the ſame; ſee in the ſecond part of the Inſtitutes in the expoſition upon the ſtatute of W. 1. ca. 13. and W. 2. ca. 34. and the firſt part of the Inſtitutes, ſect. 190. 7 H. 6. 2. 22 E. 4. 22. 6 H. 7. 4. b. Quia in caſu quando aliquis, &c. 6 R. 2. ca. 6. 18 Eliz. cap. 6.

[a] The doubt that was made in 14 Eliz. at what age a woman child might be ravithed, was the cauſe of the making of the [b] act of 18 Eliz. ca. 6. for plain declaration of the law. [That if any perſon ſhould unlawfully know and abuſe any woman-child under the age of ten years, every ſuch unlawful and carnall knowledge ſhould be felony, and the offender therein being duly convicted, ſhall ſuffer as a felon without allowance of clergy.] Lib. 11. fo. 29. Alexander Poulters caſe. See the 1. part of the Inſtitutes. ſect. 190. Mich. 19 E. 3. Coram rege. Rot. 159. London quid ipſam de puellagio ſuo felonicè et totaliter defloravit.

[c] Although there be *emiſſio ſeminis*, yet if there be no penetration, that is, *res in re*, it is no rape, for the words of the indictment be, *carnaliter cognovit, &c.* 7 H. 6. 2. 22 E. 4. 22. 6 H. 7. 4. b.

[d] In the parliament rolls we read what deteſtation hath been had of this hainous offence. At the petition of Iſabell late the wife of John Botiler of Beauſie in the county of Lancaſter knight, which Iſabell one William Pull of Wirrall in the county of Cheſter gent, ſhamefully did raviſh. It is enacted by authority of parliament, that if William Pull doe not yeeld himſelf after proclamation made againſt him, that he ſhall be taken as a traitor attainted. [a] Di. 14 El. f. 304. [b] 18 El. ca. 6. [c] See before in the next preceding chapter of buggery.

[e] The ſame Iſabell by another petition ſhewed, how the ſaid William by dures and menace of impriſonment inforced her to marry him, and by colour thereof raviſhed her, for the which ſhe prayeth her appeal, which to her is granted. [d] Rot. Parl. 15 H. 6. nu. 14. [e] In the ſame roll nu. 15.

[f] Margaret late the wife of ſir Thomas Malefant knight, made the like complaint againſt one Lewis Leyſon aliàs Gethey a Welchman. Againſt whom the like order is taken, as was for the ſaid Iſabell: onely where the rape was committed in Wales, it is enacted, that the ſame ſhall be tried in Somerſetſhire. [f] Rot. Parl. 18 H. 6. nu. 28.

[g] Upon complaint of Henry Beamont ſon and heir of ſir Henry Beamont knight, and Charles Vowell eſquire, &c. againſt one Edward Lancaſter of Skipton in Craven eſquire, for taking away dame Joan Beamont the late wife of the ſaid Sir Henry, being lawfully married to the ſaid Charles, and for that the ſaid Edward married the ſaid dame Joan againſt her will, and raviſhed her. Againſt Edward Lancaſter and others, remedy is given by appeal, and further [h] upon occaſions happening thereupon, the ſtatute [g] Rot. Parl. 31 H. 6. nu. 72. [h] 31 H. 6. ca. 9.

ſtatute of 31 H. 6. was made, which giveth remedy to a woman enforced to be bound by ſtatute or obligation, as by the act it appeareth.

It is read in ſtory, that chaſt Lucretia being raviſhed, ſhe was found in extreme heavineſſe, and it was demanded of her, *Salvan?* ſhe anſwered, *Quomodo mulier ſalva eſſe poteſt læſa pudicitia?* and yet thereof it is truly ſaid, *Duo fuerunt, et unus commiſit adulterium.*

Gen. 34. In the holy hiſtory you ſhall read, *Dinam cum vidiſſet Sichem filius Hemor Hevei princeps terræ illius, adamavit et raputt, &c.* Obſerve

2 Sam. 13. 14. 19. well what followed thereupon. Likewiſe, *Ammon prevalens viribus ſuis oppreſſit Thamar ſororem ſuam, et cubavit cum ea, &c. quæ aſpergens cinerem capiti ſuo, ſciſſa talari tunica, impoſitis manibus ſuper caput ſuum ibat ingrediens et clamans &c.* And obſerve alſo the end of the offender.

[61]

CAP. XII.

Felony for carrying away a Woman againſt her Will, &c.

Exod. 21. 16. Deut. 24. 7. * 1 Tim. 1. 10. WE have thought good next after Buggery and Rape, to ſpeak of the ſtealing of women, becauſe the * apoſtle doth rank, after the ſodomite, him that is plagiarius, ſo called, becauſe *lege Flavia plagis damnaretur.* And we will begin with the ſtatute of 3 H. 7. cap. 2.

3 H. 7. c. 2. 39 El. cap. 9. Where women, as well maidens, as widows and wives, having ſubſtances, ſome in goods moveable, and ſome in lands and tenements, and ſome being heirs apparant unto their anceſtors, for the lucre of ſuch ſubſtances, been oftentimes taken by miſdoers, contrary to their will, and after married to ſuch miſdoers, or to other by their aſſent, or defoyled, to the great diſpleaſure of God, and contrary to the kings laws, and diſparagement of the ſaid women, and utter heavineſſe, and diſcomfort of their friends, and to the evill enſample of all other: it is therefore ordained, eſtabliſhed, and enacted by our ſoveraign lord the king, by the advice of the lords ſpirituall and temporall, and the commons in the ſaid parliament aſſembled, and by authority of the ſame, That what perſon or perſons from henceforth that taketh any woman ſo againſt her will unlawfully, that is to ſay, maid, widow, or wife, that ſuch taking, procuring, and abetting to the ſame, and alſo receiving wittingly the ſame woman ſo taken againſt her will, and knowing the ſame, be felony. And that ſuch miſdoers, takers, and procurators to the ſame, and receytors, knowing the ſaid

offence in form aforeſaid, be henceforth reputed and judged as principall felons. Provided alway that this act extend not to any perſon taking any woman, only claiming her as his ward, or bondwoman.

This act on the offenders part doth extend to all degrees, and to all perſons, but extendeth not to all women: for on the womans part four things are neceſſarily required to make the offence felony. Firſt, that the maid, wife, or widow have lands or tenements, or moveable goods, or be an heir apparent. Secondly, that ſhe be taken away againſt her will. Thirdly, that ſhe be married to the miſdoer, or to ſome other by his conſent, or be defiled, (that is, carnally known) for if theſe concurre not, the miſdoer is no felon within this ſtatute, but otherwiſe to be puniſhed. And ſo it was reſolved, 3 & 4 Ph. and Mar. And after reſolved by all the judges of England upon adviſed conſideration of this act of 3 H. 7. and upon conſultation, and conference between them, as the lord Dier hath reported under his own hand, which I have ſeen, but the report thereof is omitted in the print; and the indictments grounded upon this ſtatute, are according to this reſolution. Fourthly, that ſhe be not ward, or bondwoman to the perſon that taketh her, or cauſeth her to be taken only as his ward, or bondwoman.

3 & 4 Ph. and Mar. juſtice Dalitons report. Mich. 26 Eliz. Dier manuſcript. And ſo reſolved by parliament. in anno 39 El. cap. 9.

By this act, not only the takers, but the procurers, abetters of the felony, and receivers of the ſaid woman wittingly, knowing the ſame, be all adjudged as principall felons: the like whereof we finde not in any other ſtatute, that we remember. But by a conſtruction of the common law, they that receive the miſdoers, and not the woman, are acceſſories; for this act maketh the receivers of the woman, &c principals.

Nota, quia raro.

[62]

For the odiouſneſſe of this offence, the benefit of clergie is taken away from all the offenders againſt the ſaid act. Vid. Kelway, and Stanford.

39 Eliz. cap. 2. Kelway, St. b. Stanf. pl. cor. 37. b.

See a good and profitable ſtatute made for ſuch as take away maidens or women children, &c. within the age of ſixteene yeares (though it be not againſt their will) without conſent of parents, &c. and a penalty impoſed for deflowring, or contracting matrimony with ſuch maids or women-children; and further, the forfeiture which ſuch maid or woman-childe undergoe, which conſent to ſuch contract, &c. But becauſe we are now to ſpeak of felonies, whereunto that act extends not, we refer the reader to the ſtatute itſelfe. Only we will adde a caſe which we find in the parliament roll.

4 & 5 Ph. and Mar. cap. 8. Hil. 34. Eliz. lib. 3. fo. 37. Ratcliffes caſe.

The Lady Nevill of Eſſex complained in parliament, that John Brewſe and others brake her houſe at London, and violently took thereout Margerie the daughter of John Nierford her ſonne (by her firſt huſband) and carried the ſaid Margerie away to the houſe of Sir Robert Howard knight; and they kept away the ſaid Margerie, to the end ſhe ſhould not purſue in court chriſtian, for the annullation of a contract of matrimony, againſt the ſaid John Brewſe. This was holden ſo great an offence, as the ſaid Sir Robert was committed by the lords to the Tower of London, and he after found ſurety, and promiſed to do his uttermoſt to bring forth the ſaid Margery by a day prefixed, or elſe to yield himſelf priſoner to the Tower

Rot. Parl. 2 R. 2. nu. 34.

Tower againe: but it ſeems the maid was reſtored to her mother againe, &c. for I find no further proſecution of that cauſe. See hereafter, cap. 45, *in fine.* 43 Eliz. cap. 13.

CAP. XIII.

Of Felonie for cutting out of Tongues, and putting out of Eyes, &c.

5 H. 4. ca. 5. IF any man doe cut out the tongue, or put out the eyes of any of the kings lieges, of malice prepenſed, it is felony.

The miſchiefe before this ſtatute was, that when one had been beaten, wounded, maimed, or robbed, &c. the miſdoers, to the end that the party grieved might not be able to accuſe them, did cut out their tongues, or put out their eyes, pretending the ſame to be no felony: and therefore it is ordained and eſtabliſhed to be felony by this act.

Here it is to be obſerved, that where it doth appear by the preamble of this law, that this offence had been before this act daily done: this law did ſo terrifie offenders, as we remember not, that we have read in any book or record, any to be indicted, &c. upon this law, above one at the moſt. And of all ſtatutes theſe are to be preferred, which prevent offences before they be done, before thoſe which puniſh them after they be done. And therefore in the making of this law there was *ſalutaris ſeveritas, et beata ſecuritas.*

Malice prepenſed.] That is, voluntary and of ſet purpoſe, though it be done upon a ſudden occaſion: for if it be voluntary, the law implyeth malice.

Bract. lib. 3. fo. 144. b. We read in Bracton, that the cutting off of a mans privie members was felony by the common law: for he ſaith, *Quid dicitur ſi quis alterius virilia abſciderit, et illum libidinis cauſa vel convitii caſtraverit? tenetur ſive hoc volens fecerit, vel invitus, et ſequitur pœna aliquando capitalis, aliquando perpetuum exilium cum omni bonorum ademptione.* And agreeable thereunto, I finde a record in Bracton's time to this effect: *Henricus Hail et A. uxor ejus capti et detenti ſunt in priſona de Evilcheſter, eò quòd rectati fuerunt quòd ipſi abſciderunt virilia Johannis Monachi, quem idem Henricus deprehendit cum prædicta A. uxore ejus, &c.* Fleta ſaith, *Si quis caſtratus fuerit, talis pro mahemiato poterit adjudicari.* And, therewith agreeth old juſtice Sennal in the Mirror; and ſo is the law holden at this day. And in the Appeale and Indictment of Mayhem it is ſaid, *felonicè mayhemavit:* whereof we ſhall ſpeak more hereafter in his proper place. Cutting off of eares is no felony, as it appeareth by the ſtatute of 37 H. 8. Vid. Stanf. Pl. cor. 27. a. The offender ſhall have the benefit of his clergie.

Rot. Clauſ. anno 13 H. 3. m. 9.

[63]

Fleta, lib. 1. ca. 38. Mir. ca. 1. § 9. De homicidio. See hereafter ca. 53. of Mayhem. 37 H. 8. cap. 6. Mir. cap. 4. De artic. de Eire,

CAP.

CAP. XIV.

OF BURGLARIE.

A BURGLAR (or the perſon that committeth burglary) is by the [a] common law a felon, that in the night breaketh and entreth into a manſion houſe of another, of intent to kill ſome reaſonable creature, or to commit ſome other felony within the ſame, whether his felonious intent be executed or not. We call it in Latin *burglaria:* and in *ſtatuto de officio coronat.* the offenders are called *raptores domorum.*

[a] Inter leg. Edm. cap. 6. fo. 76. 22 Deut. 2.

This word [b] *burglar*, is derived of theſe two words, viz. *burgh*, ſignifying an houſe, and *laron* ſignifying a thief, as it were an houſe-thiefe. [c] The Saxons called it hurbnec, *inter ſcelera inexpiabilia.* And aptly was it derived from *latro:* for,

[b] Lib. 4. fo. 39. Brooke's caſe.

[c] Inter leges. Canuti, fo. 118. cap. 61. Lamb.

[d] *Ut jugulent homines, ſurgunt de nocte latrones.*

[d] Horace lib. 1. epiſt.

[e] Britton calleth him a *burgeſſor.* Then let us peruſe the branches of this deſcription.

[e] Britton, fo. 17.

In the night.] [f] The word in the indictment or appeale, is, *noctanter, id eſt, noctu.* The natural day is divided *in lucem*, light, which is *dies ſolaris*, and *in tenebras*, which is night. [g] And therefore as long as the day-light continues, whereby a mans countenance may be diſcerned, it is called day: and when darkneſſe comes and day-light is paſt, ſo as by the light of day you cannot diſcerne the countenance of a man, then it is called night. [h] *Poſuiſti tenebras, et facta eſt nox, in qua pertranſeunt beſtiæ ſilvæ; ſol oritur et congregatæ ſunt, exit homo ad opus et operationem ſuam, et redit veſpere.* This doth aggravate the offence, ſith the night is the time wherein man is to reſt, and wherein beaſts runne about ſeeking their prey.

[f] 4 E. 6. Br. cor. 185.

[g] Stanf. pl. cor. fo. 30. 3 E. 3. cor. 293.

[h] Pſal. 164. Lib. 7. fo. 6. b. Milborns caſe.

In ancient records *crepuſculum* was ſignified, when it was ſaid *Inter canem et lupum:* for when the night begins, the dog ſleeps, and the wolf ſeeks his prey. For ſo we finde the entry oftentimes in the raigne of E. 1. as taking one example for many. [i] *Margeria filia Nicolai de Okele appellat Johannem Choſe pro raptu, et pace regis fracta, die Martis, &c. inter canem et lupum, id eſt, inter diem et noctem, vel in crepuſculo, Anglicè* twylight.

[i] Tr. 7 E. 1. coram rege, Rot. 12 Gloc.

[k] *In placito de domo combuſta malitioſè hora veſpertina, ſcilicet inter canem et lupum venerunt malefactores, A. B. &c.*

[k] Placita corone apud novum caſtrum, anno 24 E. 1. Rot. 6. in dorſo.

[l] *Ignitegium, à tegendo ignem*, i. coverle fue, *hora octava poſt meridiem.*

[l] Hil. 3. R. 2. coram rege Rot. 8. London. John Imperials caſe.

[m] Bracton ſaith, *Si quis furem nocturnum occiderit, ita demum impune feret, ſi parcere ei ſine periculo ſuo non potuit; ſi autem potuit, aliter erit, in manibus enim regis ſunt vita et mors hominum, ſicut coram rege apud Windeſore de quodam homine de Cecham, coram Gulielmo de Ralegh tunc juſticiario, cui dominus rex in tali caſu perdonavit mortem.* Agreeable hereunto was the law of the Twelve Tables, *Si noctu furtum factum ſit, jure cæſus eſt.*

[m] Bract. lib. 3. fo. 144. b. Pardon.

Break

1 Mar. Dier 99. *Break and enter.*] The words of the indictment be, *Fregit et intravit:* and this is understood of an actuall breaking of the house, and not of a breaking in law: for every entry into the house by a trespasser, is a breaking in law: but in case of a burglary, every entry is not a breaking of the house, for the words of the indictment be, *Felonicè et burglariter fregit, &c.* As if the doore of a mansion house stand open, and the thief enter into the house with a purpose to steale, this is a breaking of the house in law, and yet no burglary, because there must be an actuall breaking. So it is if the window of the house be open, and a thiefe with a hook or other engine draweth out some of the goods of the owner: this is no burglary, because there is no actuall breaking of the house. But if the thiefe breaketh the glasse of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actuall breaking of the house. It is deemed an entry, when the thiefe breaketh the house, and his body, or any part thereof, as his foot, or his arme, is within any part of the house: or when he putteth a gun into a window which he hath broken, or into an hole of the house which he hath made, of intent to murder or kill; or as hath been said, a hook or other engine into any part of the house which he hath broken, of intent to steale: this being put by him into the house, is an entry and breaking of the house. But if he doth barely break the house without any such entry at all, that is no burglary, for it must be *fregit et intravit.*

Stanf. pl. cor. 30. a. Dier 1 Mar. 99. a. 22 Ass. p. 39. 95.

* 13 H. 4. 13. * If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing neere to the doore, or about other parts of the house, or at a lanes end, or some orchard gate, or field gate, or the like, to watch that no help shall come to defend and aide the owner or dweller; this is burglary in all.

That which is done *in fraudem legis*, the law giveth no benefit thereof to the party. As if thieves come in the night with hue and cry, pretending that they be robbed, and shall require the constable to search for the felons, and whilest he goeth with them into some mans house, they binde and rob the constable, and dweller, this is burglary; for in judgement of law it is their act.

Into a mansion house.] The indictment saith, *Domus mansionalis*, a mansion or dwelling-house.

a 2 E. 6. Br. cor. 180. Britton, fo. 17. a *Domus mansionalis* is divided into two branches, viz. to inset edifices, as hall, parler, buttry, kitching, and lodging chambers, &c. and the outset buildings, as barnes, stables, cowhouses, dairies, &c. all these are parcels of the mansion-house, and will passe by the name of *domus mansionalis*. And albeit every mansion-house hath not all these buildings, yet every house for the dwelling and habitation of man is taken to be a mansion-house, wherein burglary may be committed.

b Lib. 4. fo. 40. in Brooks case. Hil. 38 Eliz. per les justices, ibid. b If a man hath a mansion house, and upon some accident he and all his family some part of the night are out of the house, and in the mean time a thief break and enter into the house, of intent to steale; this is burglary, although neither the owner nor any of his family is in the house: for the indictment of burglary is, *domum mansionalem, &c. fregit, &c.* and this is *domus mansionalis.*

c 23 H. 8. cap. 1. 5 E. 6. cap. 9. See *inter leges* Aluredi. c. 6. c See hereafter the statutes of 23 H. 8. and 5 E. 6.

If

[d] If a man do break and enter a church in the night, of intent to ſteale, &c. this is burglary, for *eccleſia eſt domus manſionalis omnipotentis Dei.* [e] *Fruſtra legis auxilium invocat, qui in legem committit.* [f] *Domus mea domus orationis vocabitur, vos autem feciſtis illam ſpeluncam latronum. Sacrilegium derivatur à ſacro et legere, id eſt, furari.*

[d] Britton. fo. 17. Dier, 1 Mar. 99. 22 E. 3. tit. cor. 264. [e] 22 Aſſ. p. 95. 26 Aſſ. 19. [f] 27 Aſſ. 42. 20 E. 2. Cor. 283. 12 E. 3. Cor. 120. Rot. Clauſ. 3 E. 3. m. 2 & 18. the ordinary may allow clergy for ſacriledge. Lib. 11. fo. 29.

A tent or booth in fair or market, is not *domus manſionalis*, but of another name or kind; [g] but that is provided for by the ſtatute of 5 E. 6. cap. 9. whether the robbery be done in the night, or in the day, the owner, &c. being within the ſame, ſleeping or waking. But a ſhop wherein any perſon doth converſe being parcell of a manſion-houſe, or not parcell, is taken for a manſion-houſe.

Likewiſe a chamber or room, be it upper or lower, wherein any perſon doth inhabit or dwell, is *domus manſionalis*, in law.

[65]

[f] Matth. 21. 23.

Our ancient authors and old records did expreſſe burglary under this word, *hamſuckne*, or *hamſokne*. The firſt is derived from two Saxon words, viz. of *ham*, that ſignifieth a manſion-houſe, *domus manſionalis*, which to this day we call our home: and *ſuckne* or *ſuccen*, that is, *ſeeken*, as much to ſay, as to ſeek a man in his houſe to ſlay or rob him.

[g] 5 E. 6. cap. 9.

It is to be noted that our ancient authors, nor our old book-caſes do diſtinguiſh between the day and the night, when the offence ſhould be committed in the houſe, ſave only the Mirror.

Si quis hamſockne, *quæ dicitur invaſio domus contra pacem domini regis in domo ſua ſe defenderit, et invaſor occiſus eſt, imperſecutus et inultus remanebit, ſi ille quem invaſit aliter ſe defendere non potuit: dicitur enim quòd non eſt dignus habere pacem, qui non vult obſervare eam.* And the Mirror ſaith, *Hamſockne de auncient ordinance eſt peche mortel, car droit eſt que cheſcun eyt quiet en ſon hoſtel, q. a la lev eſt.*

Bracton, lib. 3. fo. 144. b. Britton, fo. 33. Statut. Walliæ, fo. 6. ter. de Snoden. Mirr. cap. 1. § 11. de Hamſockne.

Others derive *hamſockne* from *ham*, which of both ſides is confeſſed to be a manſion-houſe, and *ſockne* which ſignifies a court, as much to ſay, as to have juriſdiction, or to hold plea of offences done to a man in his houſe.

Expoſit. vocab. inter ſtatuta. Fleta, lib. 1. ca. 42.

One was indicted, *Quod clauſum I. S. fregit, &c. ad ipſum interficiendum.* This is not felony without any act done, though it were *noctanter:* for the appeale and indictment of burglary is *quod domum manſionalem, &c. fregit et intravit.* So as neither cloſe nor any other place, but the manſion-houſe only is required to make burglary. But burglary may be committed as well in the outſet buildings, as in the inſet, for all are parts of the manſion-houſe, and he that breaketh any of the outſet buildings doth break *domum manſionalem*, as well as he that breaks the inſet.

13 H. 4. fol. 7. tit. cor. 229.

Of intent to kill.] If a man be indicted, that he in the night time did felonioufly break the houſe of I. S. *ad verberandum ipſum I. S.* this is no burglary, becauſe it was but to beat, and not to kill. But if it were *ad interficiendum I. S.* then it is burglary, though he never touched him; for the intent muſt be to commit felony, and not treſpaſſe, or other thing that is not felony, the words of the appeale or indictment being, *Quod felonicè et burglariter fregit, et intravit, &c.* ſo as there muſt be a felonious and burglarious intent.

13 H. 4. ubi ſup.

Or to commit ſome other felony.] They be burglers which break any houſe or church in the night, although they take away nothing:

22 E. 3. cor. 264. 22 Aſſ. 39. & 95.

thing: otherwiſe it is of robbery, as ſhall be ſaid hereafter. See Stanf. Pl. Cor. 30. b.

23 H. 8. cap. 1. 5 E. 6. ca. 9.

The ſtatutes of 23 H. 8. cap. 1. and 5 E. 6. cap. 9. do not define what burglary is, but take away the benefit of clergy from certaine kindes of burglary. As when an actuall robbery is done, and when the owner or dweller, &c. is put in fear, &c. or when the owner or dweller, &c. is ſleeping or waking within any place within the precinct of the ſame houſe; theſe circumſtances do aggravate the burglary: and therefore the makers of thoſe ſtatutes took away the benefit of clergie not in all caſes of burglary, but in thoſe particular caſes where a robbery is done, &c. But the ſtatute of 18 Eliz. cap. 6. hath taken away the benefit of clergie in all caſes of burglary: and hereby a good and equall proportion is kept in all caſes of this nature. And both acts of parliament, and the reſolution of judges do well agree together, which ſome not well obſerving have publiſhed manifeſt errours, which being in caſe of life are fit to be reformed.

Clergie. 18 Eliz. cap. 6.

39 Eliz. ca. 15.

If any man ſhall break a houſe by day, and take away thence money or goods to the value of five ſhillings or more, in any part of a dwelling houſe, or outhouſe belonging to the ſame, though no perſon be therein, for this felony he ſhall loſe the benefit of his clergy, ſo as for this offence the party ſhall ſuffer death, as in caſe of burglary.

[66]

CAP. XV.

Of BURNING of HOUSES.

De Incendiariis inter leges Æthelſtani, cap. 6. fo. 61. Et Canuti, cap. 61. fo. 118. *Huſbærnet* numeratur inter ſcelera inexpiabilia.

HAVING now ſpoken of burglaries, and felonies concerning houſes, there reſteth one other of that kind, wherewith we will conclude this diviſion, and that is, Burners of houſes: which being a felony by the common law, let us ſee what our ancient authors, and old parliaments, and records have left unto us thereof.

[a] Cap. Itineris.

[a] The ancient article of the eire was, *De incendiariis nocturnis vel diurnis, et combuſtionibus tempore pacis nequiter perpetratis.*

[b] Bract. l. 3. 146. b.

[b] Hereof Bracton ſaith, *Si quis turbata ſeditione incendium fecerit nequiter et in felonia, vel ob inimicitiam, vel alia de cauſa, capitali ſententia punietur. Nequiter dico, quia incendia fortuita, vel per negligentiam facta, et non mala conſcientia, non ſic puniuntur, quia civiliter agitur contra tales.*

Brit. fo. 16.

Britton ſaith, *Soit inquiſe de ceux que felonioſment en temps de peace aient auters blees, ou auters meaſons arſes, et ceux que ſerr' de ceo attaint, ſoient arſes, iſſint que ils ſoient punies per meſme le choſe dont ilz pecherent.*

Fleta li. 1. ca. 35. De combuſtionibus.

Fleta ſaith, *Si quis ædes alienas nequiter ob inimicitiam, vel prædæ cauſa tempore pacis combuſſerit, et inde convictus fuerit per appellum, vel ſine, capitali debet ſententia puniri.*

Mirror ca. 1. § 8. De Ardours cap. 2. § 11. De Appeal darſon. & § 12. cap. 3. § Al arſon.

The Mirror, *Ardours ſont, que ardent citie, ville, maiſon home, maiſon beaſt, ou auters chateux, de lour felonie en temps de pace pur lame*

haine ou vengeance, &c. In Appeal *de arſon. Iſſint ieo diſe, &c. Que Sebright illonque eſt defamy, &c. de ceo que a tiel jour, &c. en tiel meaſon, * ou biens, miſt le feu, &c.* And afterwards *en reſpons al arſon. Al arſon poit il dire, que la venture avient de miſchance, et nient de felony purpenſe.*

* Ou biens. W. 1. ca. 15.

So hainous was this offence, that in anno 3 E. 1. it was declared by parliament, *Que ceux queux ſont priſes pur arſon felonioufment fait, ne ſoient en aſcun manner repleviſables. Adjudicantur ſuſpendi, qui ex malitia præcogitata combuſſerunt magnam partem de Lynne in com. Norff.*

Hil. 7 E. 2. Coram rege Rot. 24. Norff.

Upon diſperſing of bills, threatning burning of houſes, &c. was made high treaſon, whereof more hereafter: but that act is repealed by 1 E. 6. cap. 12. and 1 Mar. Now upon that which hath been ſaid, our purpoſe is to frame a deſcription of this felony, as may alſo be warranted by our year-books, and the common opinion and experience at this day.

8 H. 6. ca. 6. See 15 H. 6. nu. 23.

Burning is a felony at the common law, committed by any that maliciouſly and voluntarily, in the night or day, burneth the houſe of another.

Now let us peruſe this deſcription, by all his materiall parts.

All the ancient authors.

Burning.] Putting of fire into any part of a houſe, whereby that part burneth. For it is neceſſary, that there be a burning, but it is not neceſſary, that all or any part be wholly burnt, nor that the fire hath any continuance, but the intent only ſufficeth not. As if one put fire into any part of a houſe, and it burneth not, this is no felony, for the words of the indictment be, *incendit, et combuſſit.* Again, if it doth burn, though it goeth out of it itſelf, it is felony.

3 H. 7. 10. 11 H. 7. 1. 23 H. 8. ca. 1. 25 H. 8. ca. 3. 5 & 6 E. 6. ca. 9. 4 & 5 Ph. & Mar. cap. 4. Lib. 11. fo. 35. Alexander Poulters caſe.

By the common law.] This is proved by all the ancient authors, acts of parliament, and books aforeſaid. And the reaſon thereof is, for that burning of houſes being an hoſtile action, is preſumed in law to be done maliciouſly for revenge, and as an enemy, to conſume the ſame by fire in time of peace. It was made in ſpeciall manner high treaſon, (as before is ſaid) viz. if any threatned by caſting of bils, to burn an houſe, if money be not laid in a certain place, and after did burn the houſe: but this treaſon is repealed by 1 E. 6. ca. 12. and 1 Mar. but yet the felony remaineth ſtill: for *in proditione* (as hath been ſaid) *implicatur felonia.*

3 H. 7. ubi ſupra.

[67]

8 H. 6. ca. 6. 3 H. 7. 10. per Brian. High treaſon. Nota.

Maliciouſly and voluntarily. Proved alſo by the words of the indictment, which be, *voluntariè, ex malitia ſua præcogitata, et felonicè.* For if it be done by miſchance, or negligence, it is no felony, as before it appeareth.

The law doth ſometime imply, that the houſe was burnt maliciouſly and voluntarily. As if one intend to burn the houſe of A only, and not the houſe of B. and yet in burning the houſe of A. the houſe of B. is burnt; in this caſe the burning of the houſe of B. is felony, becauſe it proceeded of the malicious and voluntary burning of the houſe of A. and the event ſhall be coupled to the cauſe, which was voluntary, and malicious: and therefore in the indictment for the burning of the houſe of B. it ſhall be ſaid, *voluntariè ex malitia ſua præcogitata, et felonicè, &c.*

Pl. Com. fo. 475.

The houſe of another.] This is not only intended of inſet houſes, parcell of the manſion-houſe, but to the outſet alſo, as barn, ſtable,

cow-houſe, ſheep-houſe, dairy houſe, millhouſe, and the like, parcell of the manſion houſe: but burning of a barn, being no parcell of a manſion houſe, is no felony: and yet if there be corn or hay within it, the burning thereof is felony, though the barn be not part of a manſion houſe. * But the offender is not ouſted of his clergy, but where he burns ſome part of a manſion houſe, or a barn with corn.

Tr. 44 Eliz. Coram rege. Ro. 20. 229. Lib. Int. Coke, fo. 25. b. lib. 4. fo. 20. Barhams caſe.

* Pl. Com. 475.

Note the ancient authors extended this felony, further then houſes, viz. to ſtacks of corn, wayns or carts of cole, wood or other goods. And it is ſaid in 3 H. 7. *ubi ſupra, Certum eſt quòd cremacio domorum felonicè fuit felonia per communem legem.*

The attempt to burn a ſtack of corn, was made felony by the ſtatute of 3 and 4 E. 6. but this is repealed by 1 Mariæ.

3 & 4 E. 6. c. 5.

Burning of the frame of a houſe, was made felony by the ſtatute of 37 H. 8. becauſe the frame of a houſe is no houſe: but that is repealed by 1 E. 6. ca. 12. and 1 Mariæ.

37 H. 8. ca. 6.

43 El. ca. 13. It is felony if any within the counties of Cumberland, Northumberland, Weſtmerland, or the B. of Dureſme wilfully, and of malice burn or cauſe to be burnt any barn or ſtack of corn or grain, without benefit of clergy.

43 El. ca. 13.

Note a diverſity between the indictment of burglary and burning; for the indictment of burglary muſt ſay (as hath been ſaid) *domum manſionalem*, but ſo need not the indictment of burning, but *domum*, viz, a barn, &c. malt houſe, or the like.

Bract. lib. 3. fo. 146. b.

[68]

CAP. XVI.

OF ROBBERY.

ROBBERY is a felony by the common law, committed by a violent aſſault, upon the perſon of another, by putting him in fear, and taking from his perſon his money or other goods of any value whatſoever. [a] See *inter leges Canuti, apertæ compilationes numerantur inter ſcelera hominum inexpiabilia.*

See the 1. part of the Inſtitutes. Sect. 501. Cuſtum. de Norm. cap. 71.

[a] Int. leges Canu. cap. 61. fo. 118. Lamb.

Robbery.] [b] It is derived *de la robe*, both becauſe in ancient times (as ſometime yet is done) they bereave the true man of ſome of his robes or garments, and alſo for that his money or other goods are taken from his perſon, that is, from or out of ſome part of his garment, or robe about his perſon. And is ranked in this place, for that it concerneth not only the goods, but the perſon of the owner. We call it, *roberia et rapina*, and the theef *raptor*. Whereof Bracton ſaith, *Eſt enim quaſi furtum rapinæ, quæ idem eſt, quantum ad nos, quod roberia, et eſt genus contrectationis contra voluntatem domini, et ſimilis pœna ſequitur utrunque delictum, unde prædo dicitur fur improbus: quis enim magis contrectat rem alienam invito domino, quam ille qui rapit?*

[b] Bracton, li. 3. fo. 146.

Bracton, lib. 3. fo. 150. b. Britton, fo. 22. Fleta, lib. 1. ca. 37. Mirror cap. 1. §. 40. Britton & Fleta, Ubi ſupra. 14 E. 3. cor. 115.

Felony by the common law.] This is agreed of, of all, both ancient and late, without any queſtion. And it is deemed in law to be amongſt the moſt hainous felonies, *crimen improbiſſimum.*

Violent

Violent assault.] This agreeth with the indictment, *violenter et felonicè cepit, &c.* Bract. li. 3. fo. 150. b.

By putting him in fear.] This agreeth also with the indictment: and this circumstance maketh the difference between a robber and a cutpurse: both take it from the person, but this takes it *clam et secretè*, without assault or putting in fear, and the robber by violent assault, and putting in fear. If one cut a purse, with money in it above twelve pence, he shall be hanged, and the benefit of clergy is taken from him. But of ancient time the punishment was otherwise. *S. captus in London cum bursa quam scidit cum tribus solidis, et hoc non potuit dedicere, et ideo amittat dextrum pollicem.* Britton saith, *Des cinsors des burses, voylens que celuy que la burse ccupa, si auter maviese ne eyt fait, eyt judgement de pillory; et silz eyent emble auter chose meinder de 12 deniers, perdent un oraile, et si le chose passe 12 deniers, eyent judgment de mort.* 10 H. 3. cor. 434. Britton, fo. 24. b.

By taking.] The words of the indictment be, *violenter et felonicè cepit. Hic opus est interprete.* For it must be understood, that there is an actuall taking in deed, and a taking in law, and that may be, when a thief receiveth, &c. For example: if thieves rob a true man, and find but little about him, take it, this is an actuall taking; and by menace of death, compell him to swear upon a book to fetch them a greater sum, which he doth, and deliver it unto them, which they receive, this is a taking in law by them, and adjudged robbery: for fear made him to take the oath, and the oath, and fear continuing, made him bring the money, which amounteth to a taking in law, and in this case there need no speciall indictment, but the generall indictment *(quòd violenter et felonicè cepit,)* is sufficient. And so it is, if at the first, the true man for fear deliver his purse, &c. to the thief. 44 E. 3. 14. 4 H. 4. 2.

This word [*cepit*] necessarily implieth, that the thief must be in possession of the thing stoln: for example, if the bag or purse of the true man be fastned to his girdle, &c. and the thief the more easily to take the bag or purse, doe cut the girdle, whereby the bag or purse falleth to the ground, this is no taking, for the thief had never any possession thereof, *et sic de similibus:* but if the thief had taken up the bag, or purse, and in striving had let it fall, and never took it again, this had been a taking, because he had it in his possession; for the continuance of his possession is not required by law. [69]

From his person.] The words of the indictment be, *à persona, &c.* If the true man seeking to escape, for the safeguard of his mony, cast it into a bush, which the thief perceiving, takes it; this is a taking in law from the person, because it is done at one time. If the true man had cast off his surcote, or other uppermost garment, and the same lying in his presence, a thief assault him, &c. and take the surcote, this is robbery; for that which is taken in his presence, is in law taken from his person: and so it is of the horse of a true man, which stands by him, *et sic de similibus.* 14 E. 3. cor. 115.

In ancient authors and records, in pleas of the crown, you shall read of *sakebere, &c.* whom we will derive and explain. *Sakebere, sacbere,* or *sacburgh, sac,* or *sak* is an ancient French word, and signifieth a bag, purse, or powch. So that *sackbere* is he that did bear the bag, &c. and in legall understanding, is he that was robbed of his mony in his bag. And this agreeth with the interpretation there-

Bract. lib. 3. fo. 150. b.

Fleta, l. 1. ca. 42. Britton fo. 22. b. & 72 b. Stanf. fo. 28.

of by Bracton, viz. *Furtū verò manifeſtū eſt, ubi latro deprehenſus eſt ſeiſitus de aliquo latrocinio, viz.* hondhabende, and bacberende, *et inſecutus fuerit per aliquē cujus res illa fuerit, qui dicitur* ſacaburth. And herewith agreeth Fleta, lib. 1. c. 42. § *Sunt autem*, &c. And Britton, fo. 22. b. & 72. b. agreeth herewith, and calleth him *ſakebere*; and ſo doth juſtice Stanford, Pl. Cor. fo. 28. term him, which (as we take it) is his right name derived of theſe two words, *ſac*, and *bere*, that is, he that did bear the bag, &c.

14 E. 3. cor. 115. 22 Aſſ. p. 39. 27 Aſſ. 38. 24 E. 3. 42. 13 H. 4. 7. 9 E. 4. 28.

Of what value ſoever.] Though it be under the value of twelve pence, that is taken; (as to the value of a penny or two pence) it is robbery, but ſomewhat muſt be taken, for the aſſault only to rob without taking ſome money or goods is no felony, and ſuch opinions, as ſeem to the contrary were maintained by that, which then was anciently holden, *Quòd voluntas reputabitur pro facto.* See before, cap. High Treaſon, fo. 5. *inſidiator viarum.*

CAP. XVII.

In what Caſes Breakers of Priſons are Felons.

In the ſecond part of the Inſtitutes upon the ſtatute of 1 E. 2. De frangentibus priſonam.

WE have ſpoken ſufficiently hereof in his proper place, in the expoſition of the ſtatute of 1 E. 2. *de frangentibus priſonam.* Only this is to be added, that in caſe of felony, the offender ſhall have the benefit of clergy, for the breach of priſon.

[70]

CAP. XVIII.

Where Eſcape Voluntary is Felony.

WE have alſo ſpoken ſomewhat hereof in the expoſition of the ſaid act of 1 E. 2. And the voluntary eſcape can be no felony in the gaoler, unleſſe the priſoner be under cuſtody by lawfull warrant expreſſing the offence, which you may ſee there at large.

2. There muſt be a felony done at the time of the eſcape: for a relation which is but a fiction in law, ſhall never make a man a felon, as likewiſe there it appeareth. See Stanford, lib. 1. cap. 26, &c.

CAP. XIX.

Of Felonie by ſtealing, carrying away, withdrawing or avoiding of Records, &c.

SI aſcun record (1) *ou parcel dicel, breif, retorne, pannell, proces, ou garrant d'attorney* (2) *en les courts le roy* (3) *de chancery* (4) *eſchequer, lun banke, ou lauter, ou ſa treaſorie* (5) *ſoit voluntarement emblee, emport, retreit, ou avoide* (6) *per aſcun clerke ou auter perſon* (7), *a cauſe de quel aſcun iudgement* (8) *ſoit reverſe* (9): *que tiel embleor, emporter, retraher, et avoider, lour procurators, councellors, et abettors* (10) *ent endites* (11) *et ſur proces ſur ceo fait, ont duement convicts per lour proper confeſſion, ou per enqueſts prender des loiall homes, (dont la moitye ſoit des homes daſcun court* (12) *de meſme les courts, et lauter moitye des auters) ſoient adjudges pur felons, et encorgent la paine de felony, et que les iudges de les courts de lun banke, ou de lauter eyent power de oier et terminer, tielz defaults devant eux, et ent fait punition, come devant eſt dit* (13). 8 H. 6. cap. 12.

IF any record or parcell of the ſame, writ, retorne, panell, proceſſe or warrant of attorny in the kings courts of chancery, exchequer, the one bench or the other, or in his treaſury be willingly ſtolne, taken away, withdrawne, or avoided by any clerk, or by other perſon, becauſe whereof any judgement ſhall be reverſed: that ſuch ſtealer, taker away, withdrawer, or avoyder, their procurators, counſellors, and abettors, thereof indicted, and by proces thereupon made thereof duly convict, by their own confeſſion, or by inqueſt to be taken of lawfull men, (whereof the one halfe ſhall be of the men of any court of the ſame courts, and the other halfe of others) ſhall be judged for felons, and ſhall incurre the paine of felony. And that the judges of the ſaid courts, of the one bench or of the other, have power to hear and determine ſuch defaults before them, and thereof to make due puniſhment, as afore is ſaid. [71]

The miſchiefe before this ſtatute was, That whereas records are of ſuch high nature and credit, as they import in themſelves abſolute verity without contradiction; to the end, that there might be an end of contention and controverſie, and men might reſt in ſafety and repoſe, certaine clerks and other perſons did oftentimes imbeſell records, or ſome parcell of them, and ſometime a writ,

writ, retorne, panell, proces, or warrant of attorney; or raſe or vitiate the ſame; by reaſon whereof divers judgements were avoided, or reverſed, whereby no man (as the ſtatute ſaith) had any thing in ſurety. This was a great miſpriſion, for the which the offenders therein might be puniſhed, either at the ſuit of the king by indictment, or at the ſuit of the party by an action upon his caſe. See the record concerning this matter following. *Placita coram juſticiariis de banco termino Trinitatis anno* 19 *E.* 1. *Rot.* 57. *indorſ.*

Radulphus de Greſhope communis attornatus de com. Weſtmerland' malitioſe rotulum excurtavit et abſcidit, et ideo per annum et diem committitur turri London, poſtea anno 20 *E.* 3. *per mandatum regis liberatur et per juſticiarios ei eſt inhibitum ne de cætero in eadē curia de aliquibus negotiis ſe intromittat.*

Which remedie and puniſhment were thought too weak againſt clerks and other perſons, which (committing ſuch things) commonly were of ſmall ability: therefore this act, conſidering the danger of the offence, maketh the ſame felony, as by the letter thereof appeareth.

* See the firſt part of the Inſtitutes ſect. 117. for this word.

(1) *Si aſcun* * *record.*] A record is regularly a monument or act judiciall before a judge, or judges, in a court of record, entred in [a] parchment in the right roll. It is called a record, for that it recordeth or beareth witneſſe of the truth, and is derived of the verb *recordor*, whereof the poet ſpeaketh,

[a] 9 E. 4. 3. b. 16 Eliz. Dier, 330. a.

Si rite audita recordor.

Virgil.

It hath this ſoveraigne priviledge, that it is proved by no other but by itſelfe. *Monumenta (quæ nos recorda vocamus) ſunt vetuſtatis et veritatis veſtigia.* And albeit the cauſe adjudged be particular, yet when it is entred of record, it is of great authority in law, and ſerves for perpetuall evidence, and therefore ought to be common to all, yea, though it be againſt the king: as it is declared by act of parliament in *anno* 46 E. 3. which you may reade in the preface to the third book of my reports.

Rot. Parl. 46 E. 3. 9 H. 7. 16. See the preface to the third book.

(2) *Breife, retorne, panel, proces, ou garr' d'attornie.*] All theſe are ſufficiently known, and yet have we treated of the ſame in the firſt part of the Inſtitutes.

(3) *En les courts le roy.*] Here are expreſsly named four of the kings courts, viz. the chancery, the exchequer, the kings bench, and the court of common pleas, and hereunto is added the kings treaſury: ſo as this act extendeth not to any other court or place, then is here named.

(4) *Chancery.*] This muſt be underſtood of the court of chancery, which proceedeth according to the courſe of the common law, as in caſe of priviledge, of *ſcire facias* upon recognizances, traverſes of offices, and the like: for as to theſe it is a court of record, but as to the proceeding by Engliſh bill in courſe of equity, it is no court of record, for thereupon no writ of error lieth, as in the other caſes.

37 H. 6. 14.

(5) *Ou ſa treaſorie.*] The kings treaſury is called *theſauraria regis*, the place where the kings treaſure is kept. This treaſure is twofold, viz. his money or coine: and another, that is far more precious and excellent, and thoſe be the ſacred judgements, records, and other judiciall proceedings under the ſafe cuſtody of the treaſurer,

treaſurer, and chamberlains of the exchequer. And this treaſury is partly in the exchequer, and partly in the towre of London: for there be ancient rolls of the treaſury remaining in the towre. And therefore this act intending to include both the one, and the other, ſaith generally, *en ſa treaſorie.* Regiſter. F. N. B. 244. d.

(6) *Soit voluntarement emblee, emport, retreit, ou avoide.*] In the indictment upon this ſtatute beſides *felonicé*, this word [*voluntarié*] muſt of neceſſity be uſed, to agree with this act. Here be four words uſed, *emblee* ſtolne, *emport* carried away, *retreit* withdrawne, *ou avoide* or avoided. So as the ſenſe is, if any record or part of it, writ, returne, panell, proces, or warrant of attorney, &c. be ſtolne, carried away, withdrawn, or avoided, &c. And this word [avoided] is a large word, and doth include, raſing, or clipping, or cutting off of the ſide, or other part of the roll, or any other kind of avoiding the ſame. 2 R. 3. 10.

(7) *Per aſcun clerk ou auter perſin.*] This act doth not extend to any judge of the court; both becauſe it beginneth with a clerk, &c. and for that by the ſtatute of 8 R. 2. a penalty is inflicted upon a judge, &c. for making any falſe entry, raſing any roll, or changing any verdict. See the ſtatute; for it extendeth alſo to clerks. Only this is to be obſerved in that ſtatute, that where it is ſaid [the king and his councell,] it is intended of the court of juſtice where the matter dependeth: for the judges are the kings councell for judicature and proceedings according to law and juſtice. 2 R. 3. 10. 8 R. 2. cap. 4. 2 R. 3. 10.

Juſtice Ingham paid in the raigne of E. 1. eight hundred marks for a fine, for that a poore man being fined in an action of debt at thirteen ſhillings foure pence, the ſaid juſtice moved with pity cauſed the roll to be raſed, and made it ſix ſhillings eight pence. 2 R. 3. 10.

This caſe juſtice Southcot remembred, when Catlyn chiefe juſtice of the kings bench in the raigne of queen Elizabeth, would have ordered a raſure of a roll in the like caſe, which Southcot, one of the judges of that court, utterly denied to aſſent unto, and ſaid openly, that he meant not to build a clock-houſe: for (ſaid he) with the fine that Ingham paid for the like matter, the clock-houſe at Weſtminſter was builded, and furniſhed with a clock, which continueth to this day.

(8) *A cauſe de quel aſcun judgement ſoit revers.*] This act extendeth only to records, whereupon judgement is given. But whether judgement be given in cauſes criminall at the ſuit of the king upon an indictment, or at the ſuit of the party in an appeale, or in actions, reall, perſonall, or mixt, or of the like nature, this act extends thereunto, if judgement be afterwards given, and to outlawries, for there judgement is given *per judicium coronatorum.* For it is not materiall whether the act be done againſt this ſtatute, either before or after judgement, ſo judgement be given. 2 R. 3. 10.

(9) *Revers*] is here taken, not only where the judgement is made erroneous, and to be reverſed by writ of error, but where the judgement is ſo annihilated, and made voide, as it bindeth not, or may be reverſed or avoided by plea. See the book in 2 R. 3. fol. 10. which expoundeth well this ſtatute.

(10) *Que tiel emblcor, emporter, &c. lour procurers, counſellors et abettors, &c.*] This act expreſly extendeth to acceſſories before, and leaveth acceſſories after to the conſtruction of law, yet may there

Vide 3 & 4 Ph. and Mar. Juſtice Daliſons Report, ubi ſup.

there be acceſſories after the fact: for whenſoever an offence is made a felony by act of parliament, there ſhall be acceſſories to it both before and after, as if it had been a felony by the common law, and therefore though this act expreſſeth acceſſories * before, yet it taketh not away acceſſories after, but leaveth them to the law, contrary to the opinion of juſtice Stanford. See before the expoſition of 3 H. 7. for taking away of women againſt their will.

Stanf. pl. cor. 44. b.

3 H. 7. cap 2.

2 R. 3. fo. 10.

(11) *Ent endites.*] If the acts that make this felony, be committed in two counties, the indictment faileth, as hath bin ſaid before upon the ſtatute of 2 & 3 E. 6. cap. 24. And this caſe of felony riſing in two counties, is not holden by any ſtatute yet made.

(12) *Dont la moity ſoit des hommes daſcun court.*] Here is a party jurie, the one halfe to be of the officers and clerks of the court, &c. for their knowledge, and for the better information of the others.

(13) *Et que les judges des dits courts de lun bank ou de lauter eyent power de oier et terminer tiels defaults devant eux, et ent faire punition, come eſt avant dit.*] This clauſe is in nature of a commiſſion to the juſtices of either bench, if the offence be committed in the county where the benches do ſit. And the juſtices of either bench have a concurrent authority, and which of them enquire firſt ſhall proceed: but if the felony be committed in another county, then where the benches ſit (as for example in Surry, Hertfordſhire, &c.) there the juſtices ought to have a commiſſion. But if the bench ſit in Middleſex, and the felony is done in London, in which caſe a commiſſion is requiſite, as is aforeſaid. But then ſome have ſaid, that by the charters of London confirmed by parliament, the major ought to be principall in the commiſſion, and the major is none of the judges authorized by this act to heare and determine this felony, but the juſtices of the one bench or the other: and therefore the ſtatute being penall, and to be taken ſtrictly, no proceeding can be. *Sed ſalva res eſt:* for the charters of the city of London extend only to ſuch offences committed in London, whereof the major with others by commiſſion may enquire of, heare, and determine, and not to ſuch offences ſo annexed by authority of parliament to other perſons (as in this caſe to the juſtices of the one bench or the other) as the major is not warranted by the ſaid act to enquire, &c. And therefore a commiſſion in this caſe may be made to the juſtices of the one bench or the other, omitting the major, *ne curia regis deficeret in juſtitia exhibenda.*

2 R. 3. 10.

2 R. 3. 11.

And albeit this kinde of felony is an heinous offence, yet may the offenders therein have their clergy; for untill the raign of H. 7. (that we may note it once for all) the benefit of clergy was not taken away by any act of parliament in caſe of felony. As for the ſtatute of *bigamis* made in 4 E. 1. it was but an expoſition and allowance of the conſtitution made at the generall councell at Lyons concerning the ſame, as before hath been ſaid. But (as we remember) the firſt ſtatute making a new felony that took away the benefit of clergy was the ſtatute of 7 H. 7, concerning ſouldiers. *Vide* lib. 8. fol. 169. & lib. 11. fol. 11.

4 H. 7. cap. 13.

22 H. 7. cap. ult.

7 H. 7. cap. 1.

CAP.

CAP. XX.

Of Felony in ſuch as uſe the Craft of Multiplication.

NONE from henceforth ſhall uſe to multiply gold or ſilver, or uſe the craft of multiplication (1): and if any the ſame doe, he ſhall incur the pain of felony. 5 H. 4. ca. 4.

This is the ſhorteſt act of parliament that we remember; before the making whereof, divers of the nobility, gentry, and others did waſt and conſume a great part of their inheritance, and wealth, about the art of multiplication, by the ſubtile and ſiniſter perſwaſion of certain impoſtors, and deceivers, which took upon them to be ſkilfull therein, and to be able to multiply gold and ſilver, being themſelves for the moſt part very poor and indigent perſons, of whom it was ſaid, *Quòd pollicentur aliis ingentes divitias, et ipſi petunt parvas drachmas.* See Chaucer our Engliſh poet, who wrote about the time of the making of this act, in the tale of the Channons Yeoman, fo. 63. *(in libro meo,)* that the end of this ſliding and curſed craft (ſo full of impoſture and deceit) is extream beggery: he is worth the reading, for he diſcovereth the ſecrets of this craft, as our act tearms it.

Now ſeeing the end of this feigned art of multiplication is meer deceit, and tendeth to the undoing of many; at this parliament the uſe of this craft of multiplication is made felony. For the better underſtanding of that which ſhall be ſaid, it is to be known, that there are ſix kinds of metalls, viz. *aurum, argentũ, æs, ſive cuprum (quia inventum fuit in Cypro) ſtannum, plumbum, et ferrum.* That is to ſay, gold, ſilver, copper, tynne, lead, and iron; for *chalybs* ſteel is but the harder part of iron, and *orichalcum, aurichalcum*, viz. lattyn or braſſe, is compounded of copper and other things.

(1) *The craft of multiplication.*] That is, to change other metals into very gold or ſilver. And this they pretend to doe by a *quint eſſence*, or a fifth eſſence. Four eſſences, or elements we know, fire, aire, water, and earth, but ſay they, this *quint eſſence* is a certain ſubtill, and ſpirituall ſubſtance extracted out of things by ſeparation from the four elements, differing really from their eſſence, as *aqua vitæ*, the ſpirit of wine, or the like, and this is called *elixar*, or the philoſophers ſtone, and it is part of alchemie, or chemie, in Latine *ars chemica*. The offenders therein are called multipliers, chemiſts, alchemiſts, &c. There * may be acceſſories to this new felony, both before and after. King Henry the ſixth, by his letters patents, *de concilii ſui deliberatione deputavit Willm. Cautelo et alios cives civitatis London ad inveſtigandam veritatem ſuper hiis quæ in ſcriptis erunt eis monſtrata, pro multiplicatione nuniſmatis,*

* 7 E. 6. Dier, 83 Rot. Pat. 34 H. 6. m. 13.

numiſmatis, tam de auro, quam argento, et quicquid in præmiſſis egerint, cum eorum opinione referrent in ſcriptis regi et concilio ſuo.

[a] Ro. Pat. 35 H. 6.

The like [a] letters patents *anno* 35 H. 6. *pro Thoma Harvie et aliis. Rex* [b] *ex ſua regali prærogativa, &c. dedit licentiam Johanni Faceby et aliis ad inveſtigandum, proſequendum et perficiendum quandam precioſiſſimam medicinam, quintam eſſentiam, lapidem philoſophorum nuncupatum, nec non poteſtatem faciendi et exercendi tranſmutationes metallorum in verum aurum, et argentum,* with a *non obſtante* of this ſtatute of 5 H. 4. By theſe letters patents this act is more explained, then by any record we have ſeen.

[b] Ro. Pat. 34 H. 6. m. 7. Hanc artem ſophiſticam impoſturam nominat *Melanchon.* Mentiendi et fallendi artem. *Petrarch. Eraſ.* in Colloquio Dæmonis præſtigias. *Peucerus Chaucer* ubi ſupra. The curſed and ſliding craft. *Vertitur in fumum quicquid ineptus agit.* See *Pancirollus.* Int. nova reperta tit. 7. fo. 357.

How theſe ſeveral kinds of metalls, as is ſuppoſed, proceed originally from ſulphur * and quickſilver, as from their father and mother, and other things concerning the ſame, you may at your leiſure read in George Agricola, lib. 10. ca. 1. Encelius, li. 1. ca. 1. Pl. Com. 339.

Vide Stanf. pl. cor. 37. b.

Almighty God in the fourth day created the earth, and no mention is made of metals, for that they were as parts of the earth.

Gen. c. 1. v. 9. cap. 2. v. 11.

The fatall end of theſe five are beggery; this kind of alchemiſt, the monopoliſt, the concealer, the informer, and poet-aſters.

Sæpe pater dixit, ſtudium quid inutile tentas?
Mæonides nullas ipſe reliquit opes.

* [75]

I could give examples (of mine own obſervation) of all theſe, if it were pertinent to our purpoſe.

CAP. XXI.

Of Felony in Hunters in the Night, or with painted Faces, in any Foreſt, Park, or Warren.

1 H. 7. ca. 1.

AT every ſuch time as information ſhall be made of any unlawfull huntings in any foreſt, park, or warren (3) by night, or with painted faces (1) to any of the kings councell (4) or any the juſtices of the kings peace (5) in the county where any ſuch hunting ſhall be had, of any perſon to be ſuſpected (2) thereof, it ſhall be lawfull to any of the ſame councell, or juſtices of peace, to whom any ſuch information ſhall be made, to make a warrant (6) to the ſherif of ſuch county, or to any conſtable, bailif, or other officer within the ſame county, to take and arreſt the ſame perſon and perſons of whom ſuch informations ſhall be made, and to have him, or them before the maker of the ſame warrant, or any other (7) of the kings ſaid councell, or his juſtices of peace of the ſame county. And that the ſaid counſellor or juſtice of peace, before whom ſuch perſon, or perſons ſhall be brought, by his diſcretion have power to examine him or them ſo brought, of

the

the ſaid hunting, and of the ſaid doers in that behalf (8): and if the ſame perſon *wilfully conceal the ſame huntings, or any perſon with him defective therein (9), that then the ſame concealment be againſt every ſuch perſon ſo concealing felony, and the ſame felony to be enquired of and determined, as other felonies within this realm have uſed to be: and if he then confeſſe the truth, and all that he ſhall be examined of, and knoweth in that behalf (10), that then the ſaid offences of huntings by him done, be againſt the king our ſoveraigne lord, but treſpaſſe finable, by reaſon of the ſame confeſſion, at the next generall ſeſſions of the peace to be holden in the ſame county, by the kings juſtices of the ſame ſeſſions, there to be ſeſſed. And if any reſcous, or diſobeiſance be made to any perſon having authority to doe execution, or juſtice by any ſuch warrant, by any perſon, the which ſo ſhould be arreſted, ſo that the execution of the ſame warrant thereby be not had, that then the ſame reſcous and diſobeyſance be felony (11), inquirable and determinable, as is aforeſaid. And over this, it is enacted and ſtabliſhed, that if any perſon or perſons hereafter be convict of any ſuch huntings with painted faces, viſors, or otherwiſe diſguiſed, to the intent they ſhould not be known, or of unlawfull hunting in time of night, that then the ſame perſon or perſons ſo convict, to have like punition, as he or they ſhould have, if he or they were convict of felony (12).

* See the expoſition of this word [conceal] hereafter in this chap.

[76]

Now let us peruſe the words of this new and ill penned law.

(1) *By night, or with painted faces.*] That is to ſay, either by night, or in the day with painted faces, for that doth equall the caſe of the night; in reſpect the offenders cannot be known, or diſcerned, in regard of ſuch diſguiſings. And albeit the body of the act ſpeaketh only of painted faces, yet it extendeth to viſors and other diſguiſings, for thoſe words are in the preamble rehearſing the miſchief, and the remedy muſt be appliable thereunto, and the laſt branch of this act doth make this point clear.

(2) *As information ſhall be made, &c. of any perſon to be ſuſpect.*] Hereby it appeareth, that a bare information without ſhewing juſt cauſe of ſuſpition at the leaſt, is not ſufficient to ground a warrant according to this act, for the words be, [of any perſon to be ſuſpected.] And this act is generall, and extends to all perſons of what eſtate or degree ſoever, and as well to women, as to men: for the words be [if any perſon] and *generalia verba ſunt generaliter intelligenda.* And it is neceſſary for him that taketh the information, to take it in writing, becauſe it is the ground of his warrant.

(3) *Of any unlawfull huntings in any foreſt, park, or warren.*] This act doth not extend to any chaſe of the king, or of any other perſon, neither doth it extend to any foreſts, parks, or warrens in uſe or reputation, and which are not foreſts, parks, or warrens in law. See the 1. part of the Inſtitutes, ſect. 378. what a foreſt, a chaſe, and a park, &c. is.

21 E. 1. tit. Foreſts. Raſt. 19.

(4) *To any of the kings councell.*] This is underſtood of the kings privy councell; and any one will ſerve, but he muſt be dwelling in the county where ſuch offence is committed.

(5) *Or*

(5) *Or to any the juſtices of the kings peace, &c.*] And likewiſe any one juſtice of the peace will ſerve.

(6) *Warrant.*] This warrant ought to be in writing under the ſeal of him that maketh it.

(7) *Before the maker of the ſame warrant, or any other, &c.*] So as the officer may carry the party arreſted before any privy counſellor, or juſtice of peace within that county, and to that effect muſt the warrant be made.

(8) *By his diſcretion have power to examine him or them ſo brought of the ſaid hunting, and of the doers in that behalf.*] So as the examination muſt conſiſt upon two parts. Firſt, of the hunting by the party himſelf. Secondly, of other doers in that behalf.

D. Haward tempore H. 1. fo. 24. Vide Holl. 10 R. 1. 153. Vide Camden Brit. 210.

(9) *And if the ſaid perſon wilfully conceal the ſaid hunting, or any perſon with him defective therein.*] This branch being in the disjunctive, if he conceal either his own offence, or of the other miſdoers with him therein, the letter of this act is that it is felony, but by conſtruction * upon the whole ſtatute, it is no felony: and a hunting without killing of any game, is within the danger of this ſtatute.

*[77]

This act is to be taken ſtrictly; for it is the firſt law that was made for the making of any hunting felony, againſt that excellent and equall branch of *carta de foreſta. Nullus de cætero vitam vel membra pro venatione noſtra, &c.* See the ſtatutes of 21 E. 1. 1 E. 3. ſtat. 1. cap. 8. 7 R. 2. ca. 4. Weſtm. ca. 8. Regiſt. fol. 9. F. N. B. fo. 67. Vet. N. B. 41. 45 E. 3. 7. 33 H. 8. Dier. 50.

Cart. de Foreſt. cap. 10.

Rot. Parl. 9 H. 4. nu. 40.

The old ſtatutes concerning the foreſts are called the good old laws, and cuſtomes, and commanded to be obſerved; and therefore this new act of H. 7. is too ſevere for beaſts that be *feræ naturæ*, whereof there can be no felony by the common law, and that in caſe of the foreſts, parks, &c. of ſubjects, which never was before: and therefore the judges have made a favourable conſtruction, as hereafter in this chapter you ſhall find.

(10) *And if he confeſs the truth, and all that he ſhall be examined of, and knoweth in that behalf.*] That is of his own guiltineſſe, and of other miſdoers with him, then this act makes it no felony, but treſpaſſe finable, as it was before: but it muſt be a wilfull concealment; therefore if he knew not the names of the other miſdoers, or knew not whether they were there or no, it is no offence, for the concealment muſt be wilfull. And ſeeing there is no time limited by this act, and the concealment ought to be wilfull, it were reaſon, that the information ſhould be made in convenient time after the fact done.

(11) *And if any reſcous or diſobeiſance be made to any perſon having authority to do execution of juſtice by any ſuch warrant by any perſon, the which ſo ſhould be arreſted, ſo that execution of the ſame warrant be not had, that then the ſame reſcous and diſobedience be felony.*] Here it is to be obſerved that the hunting being as yet no felony, the reſcons could not be felony, if this branch had not been. Herein two things are to be conſidered; firſt, that it extendeth not but to the reſcous, or diſobeyſance, that is committed by the party himſelf, that is to be arreſted, and not to any other. Secondly, that if the party reſcue himſelf, yet if he be purſued and taken, ſo as execution of the warrant be had, it is no felony, as it is manifeſt by the letter of this branch.

(12) *And*

(12) *And over this be it enacted, &c. That if any perſon or perſons hereafter to be convict of any ſuch huntings with painted faces, viſors, or otherwiſe diſguiſed, &c. or of unlawfull hunting in the night,* * *that then the ſame perſon or perſons ſo convict, to have like punition, as he or they ſhould have, as if they were convict of felony.*]

* Nota [that the] &c. So as before ſuch conviction there is no felony.

Gerrard the queens attorney general (who was a grave and reverend man) ſaid openly in the kings bench, that it had been reſolved by the juſtices upon this ſtatute, that if a man in the night, or by day with painted face doe hunt, &c. and being examined according to the act and concealeth it, this is (upon the conſtruction of the whole act) no felony; for the firſt clauſe concerning concealment, and this clauſe which now we handle, muſt be coupled or joyned by conſtruction together, viz. if any perſon be convict of ſuch hunting with painted face, or of unlawfull hunting in the night, this conviction muſt be upon not guilty pleaded, which the juſtices expounded to be the * concealment intended in the firſt branch, for they held that it ought to be a judiciall concealment, and not an extrajudiciall concealment, before one of the privy councell, or a juſtice of peace which may lie in averment, ſo as before it be felony, he muſt be convicted of ſuch hunting, &c. upon not guilty pleaded firſt: and after ſuch conviction then muſt he be indicted again, *ſuper tota materia*, that he *felonicè* did conceal, &c. againſt the form of the ſtatute: and if the offender upon the firſt indictment confeſſeth the indictment, then it is ſuch a judiciall confeſſion as this act intendeth, and no felony within this ſtatute. And this we heard the attorney report, and then obſerved it, which concurring with our own opinion we thought good to publiſh, and the rather for that in maſter Lambards book of Juſtice of Peace amongſt his precedents of indictments an erroneous precedent of an indictment is of felony for the conceaſment, &c. upon examination before juſtices of peace.

Mic. 19 & 20 El. In the kings bench a report of the reſolution of the juſtices upon this branch.

* Concealment expounded.

[78]

It is ſaid in 33 H. 8. that chaſing in parks is made felony, (intending this ſtatute) notwithſtanding it may be made treſpaſſe at the pleaſure of the party, which we think is the cleareſt way.

Dier, 33 H. 8. fol. 50. a.

Now what time ſhall be adjudged night, ſee before in the chapter of Burglary. For this felony the delinquent may have his clergy: ſee Stanford, 37. b.

CAP.

CAP. XXII.

Of Felony for imbeſiling the Kings Armour, Ordnance, &c. or Victuall, to the Value of Twenty Shillings, provided for Souldiers.

31 El. cap. 4.

BE it enacted by the authority of this preſent parliament, that if any perſon, or perſons, having at any time hereafter the charge or cuſtody of any armour, ordnance (1), munition, ſhot, powder or habillements of war (2) of the queens majeſties, her heirs, or ſucceſſors, or of any victuals provided for the victualling of any ſouldiers, gunners, mariners, or pioners, ſhall for any lucre, or gain, or wittingly, adviſedly, and of purpoſe to hinder or impeach her majeſties ſervice, imbeſill, purloin, or convey away any the ſame armour, ordnance, munition, ſhot, or powder, habillements of war, or * victualls, to the value of twenty ſhillings, at one or ſeverall times: that then every ſuch offence ſhall be judged felony, and the offender and offenders therein to be tried, proceeded on, and ſuffer as in caſe of felony. Provided always, and be it enacted by the authority aforeſaid, that none ſhall be impeached for any offence againſt this ſtatute, unleſſe the ſame impeachment be proſecuted or begun within the year next after the offence done. And that this act, nor any thing therein contained, nor any attainder nor attainders of any perſon or perſons for any offence made felony by this act, ſhall in any wiſe extend, or be adjudged, interpreted, or expounded to make the offender or offenders to forfeit, or loſe any lands, tenements, or hereditaments any longer, then during his or their life or lives, or to make any corruption of blood to any the heir or heirs, of any ſuch offender or offenders, or to make the wife of any ſuch offender to loſe or forfeit her dower, or title of dower of or in any lands tenements, or hereditaments, or her action or intereſt to the ſame: any thing in this act contained, or any attainder or attainders hereafter to be had for any offence made felony by this act to the contrary notwithſtanding. And that ſuch perſon and perſons, as ſhall be impeached for any offence made felony by this ſtatute, ſhall by vertue of this act be received, and admitted to make any lawfull proofe that he can, by lawfull witneſſe or otherwiſe, for his diſcharge and defence in that behalfe, any law to the contrary notwithſtanding.

* Nota for victuals.

[79]

This is a neceſſary law, and ſo penned, as it requireth no curious expoſition.

(1) *Ordnance.*] That is guns or artillerie ſo called, of an order, or

or ordinance anciently made, of what bore, ſize, or bulk the ſame ſhould be. And albeit the ordinance (that we can finde) is not extant, yet the name remaineth.

(2) *Habillements of warre.*] Habillement is properly apparell or clothing: but in legall underſtanding it doth not only extend to harneſſe and armour, but to all utenſils that belong to war, without which men have not ability to maintain war.

This act making a new felony, hath five excellent proviſions, worthy to be imitated in all like caſes of new felonies. Firſt, that none ſhall be impeached for this new felony, but within a year after the offence done. Secondly, that the offender ſhould not loſe his lands any longer than during his life. Thirdly, this act makes not any corruption of blood, but that his heire ſhall inherit. Fourthly, not to make the wife loſe her dower. Fifthly, that ſuch perſons as ſhall be impeached for any offence made felony by this act, ſhall be admitted to make any lawfull proofe [a] by witneſſe, or otherwiſe for his diſcharge and defence in that behalfe.

Bonum eſt ſcire et ſequi.

Vid. hereafter, cap. of felony for any having a plague ſore a more ſpeciall proviſion.

[a] Nota.

In the ſtatute of 4 *Jacobi regis*, there is alſo a good preſident, viz. [All which trials (viz. in caſes of felony in that act before mentioned) [b] firſt for the better diſcovery of the truth, and ſecondly, for the better information of the conſciences of the jurie and juſtices, there ſhall be allowed to the party ſo arraigned the benefit of ſuch witneſſes only to be examined upon oath, that can be produced, for his better clearing and juſtification]: that as witneſſes are produced and ſworne againſt him, ſo he may have witneſſes produced and ſworne for him, for *jurato creditur in judicio.* And to ſay the truth, we never read in any act of parliament, ancient author, book caſe, or record, that in criminall caſes the party accuſed ſhould not have witneſſes ſworne for him; and therefore there is not ſo much as *ſcintilla juris* againſt it. And I well remember when the lord treaſurer Burleigh told queen Elizabeth, Madame, here is your attorney generall (I being ſent for) *qui pro domina regina ſequitur*, ſhe ſaid ſhe would have the forme of the records altered; for it ſhould be *attornatus generalis qui pro domina veritate ſequitur.* And when the fault is denied, truth cannot appear without witneſſes.

4 Jac. regis cap. 1.

[b] Nota, two excellent means for advancement of juſtice.

Hobelarius (*id eſt*, a light-horſeman) *electus in Scotiam recepit armaturas & denarios, ibidem ſervaturus, poſtea non proficiſcitur per mandatum regis, et recuſavit reddere armaturas, et denarios, &c. per juratores eſt culp. et committitur mareſchallo, et finivit regi* 10 *li. et invenit ſecuritatem ad armaturas redeliberandas, &c.*

Hil. 16 E. 3. coram rege. Rot. 129. Norff.

CAP.

CAP. XXIII.

Of Felonie in ſuch as paſſe the Sea to ſerve Forain Princes, &c. or do ſerve Forain Princes, &c. without taking the Oath of Obedience.

3 Jac. cap. 4.

EVERY ſubject of this realm (1) that ſhall goe or paſſe out of this realm to ſerve (2) any foraign prince (3), ſtate (4), or potentate (5), or ſhall paſſe over the ſeas, and there ſhall voluntarily ſerve (6) any ſuch foraine prince, ſtate, or potentate, not having before his or their going or paſſing, as aforeſaid, taken the oath of obedience (7) (preſcribed by that act) before the cuſtomer and controller of the port, haven, or creek, or one of them, or their or either of their deputy or deputies, ſhall be a felon.

Some have objected, that the going or paſſing out of this realm, to ſerve, &c. cannot be tried; for that offences done out of the realme, cannot without a ſpeciall proviſion be tried within the realme. And it is a ſure rule, that in criminall cauſes concerning life or member, *ubi deliquit, ibi punietur:* the offence is locall, and cannot be tried, but where it is committed, nor cannot be alleaged to be in any other place then where in truth it was done. To this it is anſwered, that by a latter clauſe in this act, this felony ſhall be tried in the town wherein the haven or port is, wherein he went or paſſed over; which clauſe is, And be it further enacted, that all and every offence to be committed or done againſt this preſent act, ſhall and may be inquired of, heard, and determined before the juſtices of the kings bench, juſtices of aſſize and gaole-delivery in their ſeveral aſſiſes; and all offences, other than treaſon, ſhall be inquired of, heard, and determined before the juſtices of peace in their quarter ſeſſions, to be holden within the ſhire, diviſion, limit, or liberty, where ſuch offence ſhall happen. So as by the purvien and meaning of the makers of this act, this felony muſt be tried in the county where he went or paſſed over, and conſequently in that town where part of the act was done. And theſe words [and wherein ſuch offence ſhall be committed] muſt be conſtrued in this caſe, where part of the offence is committed. For *ſic interpretandum eſt, ut verba accipiantur cum effectu:* and by the expreſſe words, all and every offence to be committed or done againſt this preſent act muſt be inquired of, heard, and determined, &c. And therefore the felony cannot paſſe away with impunity, and that which is done out of the realme ſhall be proved to the jury in evidence. Note where a forain treaſon by this act is made, it is enacted to be tryed where the offender is taken.

See 33 H. 8. ca. 7. Simile.

(1) *Every*

(1) *Every ſubject of this realme.*] This branch extends to all perſons of what eſtate, degree, or profeſſion ſoever.

(2) *To ſerve.*] Albeit the party did not ſerve, yet if the offender went or paſſed over to ſerve without taking the oath, he is in danger of this ſtatute. And this extendeth to any kind of ſervice, either in campe or army, or in houſe or otherwiſe.

(3) *Any foraine prince.*] [*Princeps*] Prince is here taken for the perſon that is *primus*, i. e. *Qui primum locum, et gradum obtinet*, whether he be king, or any other that hath ſoveraigne authority, by what name or title ſoever. The word hath other ſignifications, but not pertinent to the expoſition of this act. Prince. [81]

(4) *State.*] The former word [prince] includeth any, that is a monarch, or in nature of a monarch, or an abſolute prince. This word [ſtate] extends to any ſtate, either ariſtocraticall, where few be in authority, or democraticall, where the people have the chiefe government without any ſuperiour, ſaving ſuch as they elect and chooſe. State.

(5) *Potentate.*] This is a large word, and extendeth to potentates, as well eccleſiaſticall as temporall. Potentate.

(6) *Or ſhall paſſe, &c. and there ſhall voluntarily ſerve.*] Although he went not over of purpoſe to ſerve, but upon ſome other occaſion: yet if he after voluntarily ſerve any ſuch foraine prince, ſtate, or potentate, and have not taken the oath, he is a felon.

(7) *The oath of obedience.*] This is particularly ſet downe in the ſaid act.

And that if any * gentleman or perſon of higher degree, or any perſon or perſons, which have borne, or ſhall beare any office or place of captaine, lieutenant, or any other place, charge, or office in campe, army, or company of ſouldiers, or conducter of ſouldiers, ſhall after goe or paſſe voluntarily out of this realme to ſerve any ſuch foraine prince, ſtate, or potentate, or ſhall voluntarily ſerve any ſuch prince, ſtate, or potentate, before he and they ſhall become bound by obligation with two ſuch ſureties, as ſhall be allowed by the officers, &c. ſhall be a felon.

* Vid. hereafter cap. 34. in fine. Second part of the Inſtitutes. The ſtatute of additions. 1 H. 5. cap. 5.

By this branch, if he be a gentleman, or of higher degree, or any ſuch military man, as here is deſcribed; becauſe he is able to do more harme, if he be ſo diſpoſed, he muſt not only take the oath by the former branch, but he muſt become bound by this branch with two ſureties, &c. The forme of the obligation is ſet downe in this act. The expoſition of the former branch giveth light to the underſtanding of the reſidue of this clauſe.

There is a proviſo, that no attainder of felony, made felony by this act, ſhall take away dower, nor make, or work, any corruption of blood, or diſheriſon to the heire. The offenders in any of the ſaid caſes of felony may have the benefit of their clergie.

CAP. XXIV.

Of Felonie in Purveyors.

SEE the ſtatutes of Artic. ſuper Cartas, anno 28 E. 1. cap. 2. 18 E. 2. ca. ult. 5 E. 3. cap. 2. 25 E. 3. cap. 1. & 15. 27 E. 3. cap. 1. 36 E. 3. cap. 2. And before in the ſecond part of the Inſtitutes, in the expoſition of the ſtatute of Artic. ſuper Cartas, cap. 2. you ſhall finde in what caſe a purveyor may be charged with felony, which briefly may be reduced to theſe four heads. Firſt, [a] if any that take upon him to be a purveyor, or his deputy or ſervant make purveyance of any thing above twelve pence without warrant. Secondly, [b] or make purvevance of any thing above twelve pence without teſtimony and appriſement of the conſtable, and four honeſt men, and without delivery of tales. Thirdly, [c] or take any ſheep with their woolles between Eaſter and Midſummer, and carry them to his own houſe and ſheer them. Fourthly, [d] or make any takings or buyings, or take any carriage in other manner then is contained in their commiſſions, they ſhall have puniſhment of life and member: and this act remains ſtill in force without alteration. The offenders may have the benefit of their clergie.

See in the fourth part of the Inſtitutes, cap. Chancery. Articles againſt Cardinal Woolſey. Artic. 33, 35, 36.

[a] Artic. ſup. Cart. cap. 2. 18 E. 2. cap. ult. 5 E. 3. cap. 4.

[b] 5 E. 3. cap. 2. 25 E. 3. cap. 1.

[c] 25 E. 3. cap. 15.

[d] 36 E. 3. cap. 2. Vid. Stanf. pl. cor. 37. b.

[e] By this ſtatute it is enacted, that purveyors aſſigned by commiſſion ſhall make purveyance of victuals, corne, and other things, as well within liberties and franchiſes, as without, any grant, allowance, or other thing to the contrary, or let thereof notwithſtanding: but the purveyors ſhall obſerve the ſtatutes for them provided in every behalfe, as by that act appeareth. [f] Upon this act it was holden, that if the diſcharge of purveyance were by letters patents, this act makes it of no force: but if the diſcharge were by ſtatute, then the purveyor is bound to obſerve the ſtatute, as by the ſtatute of 14 E. 3. cap. 1. *pro clero*, eccleſiaſticall perſons are diſcharged by ſtatute, which the purveyor is bound to obſerve. See the ſtatutes of 25 E. 3. ſtatut. 5. cap. 21. & 43 E. 3. cap. 3. in what manner and in what time the kings butler or his lieutenant ſhall take wines, &c.

[e] 27 H. 8. cap. 24.

[f] Trin. 40. Eliz. coram rege. In a quo warrant: the lord Darcies caſe.

See more of purveyors in the fourth part of the Inſtitutes cap. of the Counting houſe or Green cloth.

See lib. 8. fo. 45, 46. in Evans caſe, a commiſſion for taking up of boyes for the kings chappell, the generall words well expounded.

By an act of parliament not in print, it is enacted that no purveyor arreſted for any miſdemeanour ſhall have any privy ſeal, to cauſe ſuch as arreſted him to come before the councell to anſwer to the king, but have his remedy by the common law.

Rot. Parl. anno 28 E. 3. nu. 34.

Upon a grievous complaint made at the parliament holden in the fourth year of our late ſoveraign lord king James, by the commons of the realm concerning many grievances ſuffered by his ſubjects in the execution of a commiſſion granted to certain perſons for getting of ſalt-peter, his majeſties anſwer (amongſt other things) was,

At a parliament holden 4 Jacobi regis.

was, that he had never an intention to make any application of his prerogative therein, further then might ſtand with the lawfull, and neceſſary uſe thereof. And further his majeſty was pleaſed out of his gracious care, and goodneſſe to revoke and annull all commiſſions, or grants made to any perſon or perſons, for and concerning digging, and working of ſalt-peter, intending to conſider of ſuch a courſe afterwards, as the ſame might be made without any juſt cauſe of complaint, as by the ſaid royall anſwer (amongſt other things) more at large appeareth. In purſuance whereof, by the ſaid kings commandment, Popham chief juſtice, and all the juſtices of England, and barons of the exchequer, were aſſembled at Serjeants-Inne in Fleetſtreet, in December, in the ſaid fourth year, to reſolve and certifie, what prerogative the king had for digging, and taking of ſalt-peter in the houſes, buildings, or grounds of his ſubjects, that thereupon a new commiſſion might be made accordingly, who upon often conferences, and mature conſideration reſolved as followeth.

Salt peter, *quaſi*, ſalis petræ, colligitur aut ex materia quam veteres muri, rupes, et ſaxa exſudant, aut ex terra ſalſuginoſa et puta, quæ in ſtabulis animalium urinam ad multos annos excepit, Latine *nitrum*.

[83]

First, where it was objected, that gunpowder was invented in Germany, within time of memory, in the reign of king E. 3. ſo as the king could not claim it by preſcription: and that before the 31 year of the reign of queen Eliz. (which was the yeer after the Spaniſh invaſion) we, as yet, find not any commiſſion or licence granted by any king or queen of this realm to any for the digging or taking of ſalt-petre: and in the ſaid 31 year of the ſaid late queen, two commiſſions or licences were granted, the one particular, to George Conſtable eſquire, to dig, open, and work during the ſpace of eleven years for ſalt-peter within the counties of York, Nottingham, Lancaſter, Northumberland, Cumberland, and the biſhoprick of Durham, as well within our own lands, grounds, and poſſeſſions, as alſo within the lands, grounds, and poſſeſſions of any of our loving ſubjects within the counties aforeſaid; and the conſideration of the grant was, that he ſhould deliver a great quantity of powder to be made by the ſaid George Conſtable, and provided for the ſtore of the queens majeſty at a lower rate, then was paid for it before, with this further clauſe; [And further our will and pleaſure is, that the ſaid George Conſtable ſhall at his own proper coſts and charges erect, make up, and lay all mud walls, ſtables, and grounds whatſoever ſo digged up;] whereupon it was inferred that no other buildings could be digged up by force of that commiſſion, but only ſtables. The other commiſſion was generall, made unto George Evelyn, Richard Hils, and John Evelyn, and extended throughout the realms of England and Ireland, and all other the dominions of the ſame, as well within our own proper lands, grounds, and poſſeſſions, as alſo within the lands, grounds, and poſſeſſions of any of our ſubjects, with the like clauſe of the erection and reparation, as is aforeſaid, without naming of manſion houſes by expreſſe words, and without any prohibition to the ſubject to dig for ſalt-peter in their own buildings or grounds.

In the accounts, &c. from the 21 of April 18 E. 3 for one year following anno Domini 1344. under the title of artificers and workmen (inter alios.) Gunners 6. And of their wages and ſtipends per diem, it is ſaid (amongſt others) gunners ſix pence. *Latine* bombardæ, tormenta, ſclopi.

Paſch. 49 E. 3. Coram rege rot. 27. Oxon. diverſi malefactores venerunt ad manerium, &c. cum arcubus, ſagittis, baliſcis et goons.

Vide Rot. Parl. 1 R. 2. nu. 38. William captain of the caſtle of Catherick, being charged for delivering it to the enemy, in the reign of E. 3. without commiſſion, anſwered (inter alia) that the enemies brought to battery thereof *nine* peeces des groſſes cannons.

Hollingſh. fo. 453.

Walſing. 10 R. 2. 1366.

Pol. Virg. De invent' rerum. fo. 2. ca. 11.

Pancerollus Nova reperta. Tit. 18. pag. 679. anno Domini 1378.

John More, pag. 196. anno Domini. 1382.

Purveyance of salt-peter. See the 1. part of the Institutes. Magna Carta cap. 21.

As to the first, it was resolved by all, that forasmuch as the taking of salt-peter, was for the necessary defence, and safety of the realm that the king had a right of purveyance of it; and should not be driven to buy it in forain parts, which forain princes might restrain, and so this realm might want sufficient for the defence thereof, to the great perill, and hazard of the same: but the king was to take it, for the necessary defence of the realm, according to the limitations hereafter expressed; and it is no prejudice to the owners of the soyl, for the place that is digged must be made up
2. again, and repaired in as good plight as it was beefore. Secondly, that this taking of salt-peter in the buildings or grounds of the subject, being a purveyance as is aforesaid, is an incident inseparable to the crown, and cannot be granted, demised, or transferred to any other, but ought to be taken only by the kings ministers, as other purveyances ought, and cannot be converted to any other use, then for the defence and safety of the realm, for which purpose only the law doth give to the king this prerogative; and it is not like to a mine of gold or silver in the ground of the subject, for there the king hath an interest in those metals, and not purveyance only. And if the powder which is so made by the kings ministers begin to decay, as it will doe within two or three years, then this either ought to be changed for other, or sold, and the money thereof comming to be employed for powder for the defence of the realm, and the kings ministers ought to make great provision of salt-peter, for that will last a long time, and when
[84] need is to make thereof gun-powder, which will be made before
3. the navy can be put in readingesse, &c. Thirdly, the ministers of the king cannot in digging for salt-peter undermine, weaken, or impair any of the walls or foundations of any of the houses of the subject, be they mansion houses, or out-houses, as barns, stables, dove-houses, mills, or the like, neither can they dig the floor of any mansion-house, which serves for the habitation of man, because his mansion is the safest place of refuge, and safety of himself and his family, as well in sickness, as in health, and his defence, as well in the night, as in the day, against felons, and misdoers, neither can the kings ministers dig the floor of any barn of the subject employed for the safe keeping of corn, hay, &c. for the floor of a barn cannot be made dry, or serviceable again in a long time, but they may dig in the floors of stables, and oxehouses, so that they leave sufficient room there for the horses, and other beasts of the owner, and so that they repair the same again in convenient time, as well as it was before. They may also dig in the floors of cellers, and vaults, so that the wine, beer, or other necessary provision of the owner be not removed, or in any sort impaired: and they may dig any mud wals, which be not the wals of any mansion house, and in the ruines and decayes of any houses which be not preserved for the
4. necessary habitation of man. Fourthly, they ought to make the places as well, and commodious for the owner, as they were be-
5. fore. Fifthly, they ought not to work in the possessions of the subject, but between the rising of the sun, and the going down of the same, so as the owner may make fast the doors of his house,
6. and put it in defence against misdoers. Sixthly, they ought not to place or fix any furnace, vessell or other necessaries in any house or building of the subject, without his consent, nor so neer any mansion as he by it may receive any prejudice or disquiet. Seventhly,

venthly, they ought not to continue in one place above a convenient time, nor return thither but after a long time. Laſtly, that the owner of the ſoyle cannot be reſtrained from digging, or taking of ſalt-peter, for the property thereof is in the owner of the ſoyl, and the king hath but the purveyance thereof, and that every man might work that would, and then there ſhould be more plenty of powder, and at a cheaper rate. And theſe reſolutions are agreeable with that maxime, * That the common law hath ſo admeaſured the prerogatives of the king, that they ſhould neither take away nor prejudice the inheritance of any. And theſe monopolies being *malum in ſe*, and againſt the common laws, are conſequently againſt the prerogative of the king, for * the prerogative of the king is given to him by the common law, and is part of the laws of the realm. Which reſolutions were delivered in writing by Popham chief juſtice unto the kings privy councell, as the unanimous reſolution of all the judges, and barons of the exchequer, and were by his majeſties privy councell well allowed of, and approved, as Popham chief juſtice reported. Upon theſe reſolutions theſe conſequents do follow. Firſt, if a man of his own authority, or by colour of any commiſſion, licence, or grant, doth take upon him to take any ſalt peter in the buildings, or grounds of any other ſubject to make thereof gunpowder, in any ſort to his own uſe, albeit he covenanteth, or agreeth to ſerve the king of ſo many laſts of powder: yet ſeeing it is but a purveyance, he cannot ſell any powder thereof made to any of the kings ſubjects, or make any private benefit thereof: and if he doe, he may be indicted of digging, and taking of the ſalt-peter at the kings ſuit, and be grievouſly fined and impriſoned, for that it is a grand treſpas with an high hand. Secondly, the party grieved may have his action of treſpaſſe, and recover damages for the treſpaſſe, &c. according to the quality of the treſpaſſe.

7.
8.

* Pl. Com. 236.

* Stanf. Pl. Cor. 162. a. Stanf. Prer. 5. b.

[a] Complaints made againſt purveyours in parliament.

[b] By the ſtatute of 9 R. 2. all ſtatutes made concerning purveyors be confirmed, and to be put in execution, and that juſtices of peace have power to hear and determine their offences. See the fourth part of the Inſtitutes, cap. 8. art. 33. 35. 36. againſt cardinall Woolſey.

[a] Rot. Parl. 4 H. 4. nu 111. Eodem anno 81. 9 H. 4. 15.

[b] Rot. Parl. anno 9 R. 2. nu 31. not in print

CAP. XXV. [85]

Of Felony in wandring Souldiers and Mariners.

1. ALL idle and wandring ſouldiers or mariners, or idle perſons wandring as ſouldiers or mariners, ſhall be reputed felons, and ſuffer as in caſe of felony. 39 El. ca. 17.

So as not only he that is a ſouldier, or mariner in deed, but he that is an idle wanderer, and takes upon him to be a ſouldier

or mariner, though in troth he be none, is in danger of this law; for, as the preamble ſaith, they abuſe the name of that honourable profeſſion.

2. Every idle, and wandring ſouldier or mariner, which comming from his captain from the ſeas, or from beyond the ſeas, that ſhall not have a teſtimoniall under the hand of ſome one juſtice of peace of, or neer the place where he landed, ſetting down therein the time and place when, and where he landed, and the place of his dwelling and birth, unto which he is to paſſe, and a convenient time therein limited for his paſſage, is by this act adjudged a felon.

3. Or if he hath ſuch a teſtimoniall, and ſhall exceed the time therein limited above fourteen days, he is by this act a felon, unleſſe he fall ſick by the way, ſo as after his recovery he ſetleth himſelf in ſome lawfull courſe of life, or reſort to the place where he was born, or was laſt abiding: but in both theſe two caſes he muſt be a ſouldier or mariner in deed.

4. If any ſuch idle, and wandring ſouldier, or mariner, or other idle perſon wandring as ſouldier or mariner, ſhall forge or counterfeit ſuch teſtimoniall, he is by this act a felon.

5. Or if he ſhall have with him or them any ſuch teſtimoniall forged or counterfeit, knowing the ſame to be counterfeit or forged, he is alſo by this act a felon. And in both theſe laſt caſes, as well he that is a ſouldier or mariner in deed, as he that is none, is in danger of this act.

And the offender againſt any of the articles of this ſtatute ſhall not have the benefit of his clergie.

Juſtices of aſſiſe, juſtices of gaole delivery, and juſtices of peace, have power by this act to heare and determine the ſaid felonies.

But if ſome honeſt perſon valued in the laſt ſubſidie to ten pounds in goods, or forty ſhillings in lands, or ſome honeſt freeholder, as by the ſaid juſtices ſhall be allowed, will be contented before ſuch juſtices to take him or them into his ſervice for one whole yeare, and will become bound by recognizance, as the ſtatute doth appoint, then they ſhall not proceed any further againſt him, unleſſe ſuch perſon retained depart within the year, without the licence of him, that ſo retained him; and then he is to be indicted, tried, and judged as a felon, and not to have the benefit of his clergie.

CAP.

CAP. XXVI.

Of Felonie in Souldiers that depart from their Captaines without Licenſe.

THIS ſtatute is become of little force or uſe: for the ancient manner of retainer of ſouldiers whereunto that act referreth, is utterly altered: for then knights or gentlemen expert in war, and of great revenues and livelihood in their countrey, covenanted with the king to ſerve him in his war for ſuch a time with ſuch a number of men: and the ſouldiers made their covenant with their leaders or maſters, and then they were muſtered before the kings commiſſioners, and entred of record before them; and that was certified into the * exchequer, and thereupon they took their wages of the king, as it appeareth by many preſidents of the exchequer, and may be gathered by the preamble and body of the act, and by the Regiſter, where it appeareth, that a writ was framed upon that ſtatute directed to a ſerjeant at armes *ad capiend' conductos ad proficiſcend' in obſequium, &c.* And this was thought an excellent military policy, that the ſouldiers, (part whereof were of their own tenants) ſhould be choſen and led by knights and gentlemen of quality of their owne countrey, with whom they muſt fight in war, and live withall in peace, when they returned into their countrey, in reſpect whereof, the ſouldier would the more cheerfully and obediently follow his leader, and the leader would the more reſpectfully and lovingly uſe his ſouldier when he is abroad. See the ancient forme of commiſſions for arraying and muſtering of men in 5 H. 4.

18 H. 6. cap. 19. 5 Eliz. cap. 5. extendeth it to mariners and gunners.

* By the ſtatute of 5 R. 2. cap. 11.

See the writ in the Regiſter 191, directed to the ſerjeant at armes. 5 R. 2. cap. 10. Rot. Parl. 5 H. 4. nu. 29. the like for keeping of caſtles and forts.

Rot. Parl. 5 H. 4. nu. 24, 25.

By this act the benefit of clergie was not taken away from the delinquent.

The ſtatute of 2 E. 6. cap. 2. extendeth only when the ſouldier departs after that he hath ſerved the king in his war: and ſuch an offender ſhall not enjoy the benefit of his clergie.

2 E. 6. cap. 2. renued 4 & 5 Ph. and Mar. cap. 3. 1 Ja. cap. 25.

If any ſoldier being no captain, immediately retained with the king, which ſhall be in wages and retained, or take any preſt to ſerve the king upon the ſea, or upon the land beyond the ſea, depart out of the kings ſervice without licence of his captain (1), that ſuch departing be taken, deemed, and adjudged felony. And that all the juſtices in every ſhire of England, where any ſuch offenders be taken (2), have power to enquire of the ſaid offences, and the ſame to hear, and determine, as they doe and may doe of felony, &c. expreſſed in the kings commiſſion to them made, as though the ſame offences were done in the ſame ſhire; and alſo that the departing of ſuch ſoldiers, and alſo their retainers, if it be traverſed, be

7 H. 7. cap. 1. 3 H. 8. cap. 5.

tried in the ſame ſhire, where they be for ſuch a cauſe arreſted, and arraigned.

Lib. 6. fo. 27. Caſe de ſouldiers. Dier 4 Eliz. 211.

Both theſe acts of 7 H. 7. and 3 H. 8. are perpetuall acts, for this word [king] includeth all his ſucceſſion.

(1) *Without licence of his captain.*] The ſtatute of 3 H. 8. is without licence of the kings lieutenant there.

(2) *That all the juſtices in every ſhire of England, where any ſuch offenders be taken, &c.*] This act of 7 H. 7. extends to all the kings juſtices in every ſhire, viz. juſtices of aſſiſe, gaol delivery, oier and terminer, and of the peace. And if the offender be taken in the county where the kings bench ſet, he may be indicted, &c. there: but this clauſe in 3 H. 8. is reſtrained to juſtices of peace. This clauſe in both the ſaid ſtatutes is cumulative, and for more ſpeedy proceeding with the offender. But admit the offender be never taken, yet may he be indicted of felony in the county where the departure was, and if he appear not, he may be outlawed, for by the firſt clauſe, the offence is made felony, and the ſecond clauſe is affirmative, and not privative.

[87]

See Stanf. Pl. cor. fo. 168. c.

He or they ſo offending ſhall not enjoy the benefit of his clergy.

This branch in the act of 7 H. 7. is generall, but in the act of 3 H. 8. there is an exception out of the like branch, viz. of men being within orders of holy church. So as it differeth much, whether he be indicted upon the one ſtatute, or the other.

But obſerve what puniſhment the ancient law of England inflicted upon the ſouldier that departed from the kings hoſt, both before, and ſince the conqueſt. *Item qui fugiet à domino, vel ſocio ſuo pro timiditate belli, vel mortis, in conductione heretochii ſui in expeditione navali, vel terreſtri, perdat omne quod ſuum eſt, et ſuam ipſius vitam, et manus mittat dominus ad terram quam ei antea dederat.* For the expoſition of *Heretochius* and *Hereſlite*, ſee the fourth part of the Inſtitutes, cap. *Court de Chivalry.*

Lamb. Inter. leges Edovardi fo. 136. Hoven. Annal. 35. Pœna Hereſlitæ.

Now concerning armour, arms, charges of ſouldiers, muſtering of them, &c. See the ſtatutes in print of Confirmat. Cart. 25 E. 1. Vet. Magna Cart. 2. parte, fol. 35. 1 E. 3. cap. 5. 18 E. 3. ca. 7. 25 E. 3. cap. 8. 4 H. 4. cap. 13. 11 H. 7. cap. 7. and 3 H. 8. ca. 5. and 4 & 5 Ph. & Mar. cap. 3. for appearing at muſters, &c. But 4 & 5 Ph. and Mar. cap. 2. an act for having of horſe, armour, and weapon is repealed by the ſtatute of 1 Ja. ca. 25.

An act not in print, Rot. Parl. *anno* 5 H. 4. nu. 24, 25. for arraying and muſtering of men, for watching of beacons, &c.

Records of parliament, 4 H. 4. nu. 48. 7 H. 4. nu. 124. 1 H. 5. nu. 17.

Book caſes. 48 E. 3. 3, 4. 21 E. 4. 17. per Cateſby. 9 E. 4. 26. lib. 7. fo. 7, 8.

See the ſecond part of the Inſtitutes, Confirmat. Cart. cap. 5. *ut ſupra.*

Vide Paſch. 16 E. 2. Phelip Maſter del Hoſpit. de S. Katherins caſe, *in libro meo*, fo. 83. b.

CAP.

CAP. XXVII.

Of Felony to marry a ſecond Huſband or Wife, the former Huſband or Wife living.

IF any perſon (1), or perſons within his majeſties dominions of England and Wales, being married (2), doe at any time after marry any (3) perſon or perſons, the former huſband or wife being alive, that then every ſuch offence ſhall be felony, &c. 1. Ja. cap. 11.

This is the firſt act of parliament that was made againſt polygamy. *Polygamia eſt plurium ſimul virorum, uxoruntve connubium.*

The difference between bigamy, or trigamy, &c. and polygamy is, *quia bigamus ſeu trigamus, &c. eſt qui diverſis temporibus, et ſucceſſive duas, ſeu tres, &c. uxores habuit. Polygamus, qui duas vel plures ſimul duxit uxores.*

(1) *If any perſon.*] This law is generall, and extendeth to all perſons, of what eſtate, or degree ſoever.

If the man be above the age of fourteen, which is his age of conſent, and the woman above the age of twelve, which is her age of conſent, though they be within the age of one and twenty, are within the danger of this law, which appeareth by this, that this act extendeth not to a former marriage made within the age of conſent, as hereafter ſhall appear. See the 1. part of the Inſtitutes. ſect. 104.

Being married, &c.] This extendeth to a marriage *de facto*, or voydable by reaſon of a precontract, or of conſanguinity, or of affinity, or the like: for it is a marriage in judgement of law untill it be avoided, and therefore though neither marriage be *de jure*, yet they are within this ſtatute.

(3) *Doe at any time marry.*] This ſecond marriage is meerly void, and yet it maketh the offender a felon.

And the party and parties ſo offending, ſhall receive ſuch and the like proceeding, triall and execution in ſuch county, where ſuch perſon or perſons ſhall be apprehended, as if the offence had been committed in ſuch county, where ſuch perſon or perſons ſhall be taken or apprehended.

See before the expoſition of the ſtatutes of 7 H. 7. and 3 H. 8. concerning departing of ſouldiers, &c.

Out of the generality of this law, there be five exceptions: Firſt, it extendeth not to any perſon or perſons, whoſe huſband or wife be continually remaining beyond the ſeas, by the ſpace of ſeven years together. By this branch notice is not materiall, in reſpect of the commorancy beyond ſea. See 22 E. 4. Conſultation. 5. The opinion of the doctors. Pains caſe lib. 9. fo. 72.

Secondly, it extends not, when the huſband or wife ſhall abſent him or herſelf, the one from the other, by the ſpace of ſeven years in any parts within his majeſties dominions, the one of them not knowing

knowing the other to be living within that time. Here notice is materiall, in reſpect the commorance is within the realm.

* Thirdly, nor to any perſon or perſons, that at the time of ſuch marriage be divorced by any ſentence had in the eccleſiaſticall court.

There be two kinds of divorces, the one that diſſolveth the marriage *à vinculo matrimonii*; as for precontract, conſanguinity, &c. and the other *à menſa et thoro*; as for adultery, becauſe that divorce by reaſon of adultery, cannot diſſolve the marriage *à vinculo matrimonii*, for that the offence is after the juſt and lawfull marriage. This branch in reſpect of the generality of the words, priviledge the offender from being a felon, as well in the caſe of the divorce *à menſa et thoro*, as where it is *à vinculo matrimonii*, and yet in the caſe of the divorce *à menſa et thoro*, the ſecond marriage is void, living the former wife or huſband. And if there be a divorce *à vinculo matrimonii*, and the adverſe party appeal, which is a continuance of the former marriage, and ſuſpend the ſentence, yet after ſuch a divorce, the party marrying is no felon within this ſtatute, in reſpect of the generality of this branch, although the marriage be not lawfull.

Fourthly, nor to any perſon or perſons, where the former marriage is by ſentence in the eccleſiaſticall court declared to be void and of no effect.

Fifthly, nor to any perſon or perſons, for or by reaſon of any former marriage made within age of conſent: hereby it appeareth that the makers of the law intended that this act ſhould extend to every perſon above the age of conſent.

If the man be above fourteen, and the wife under twelve, or if the wife be above twelve, and the man under fourteen, yet may the huſband or wife ſo above the age of conſent, diſagree to the eſpowſals, as well as the party that is under the age of conſent; for the advantage of diſagreement muſt be reciprocal. And ſo it was reſolved by the judges and civilians, Trin. 42 Eliz. in the kings bench, in a writ of error between Babington and Warner. So as if either party be within age of conſent, it is no former marriage within this act.

Trin. 42 Eliz. Coram rege. Inter Babington and Warner.

The offender againſt this ſtatute may have the benefit of his clergy.

If he be a nobleman and lord of parliament, he ſhall be tried by his peers, albeit there be no proviſion ſpeciall for it: for of common right, (that we may ſay it once for all) in caſe of treaſon, felony, and miſpriſion of treaſon or of felony (as hath been ſaid before) he is to be tried by his peers.

Marriage in ſome ſort felony by the common law.

I find that by the ancient law of England, that if any Chriſtian man did marry with a woman that was a Jew, or a Chriſtian woman that married with a Jew, it was felony, and the party ſo offending ſhould be burnt alive.

Contrahentes cum Judæis, Judæabus, pecorantes, et ſodomitæ in terra vivi confodiantur, &c. Fleta lib. 1. ca. 35. §. *Contrahentes.*

CAP.

CAP. XXVIII.

Of Felony for any having a Plague ſore upon him, contrary to Commandment goeth abroad, &c.

IF any perſon infected with the plague, commanded (by ſuch perſons as are appointed by the act) to keep houſe, ſhall contrary to ſuch commandment wilfully and contemptuouſly goe abroad, and ſhall converſe in company, having any infectious ſore upon him uncured, ſuch perſon ſhall be adjudged a felon. 1 Jac. ca. 31.

This is felony, albeit no other perſon by ſuch means be infected, for this ſtatute was made to prevent the moſt horrid and fearfull infection of the plague. The law was generall, and extended to all eſtates and degrees whatſoever, and was grounded upon the law of God: and the reaſon of the law of the realme is, that the infectious ſick ſhould be removed from the whole. The party offending might have had the benefit of his clergy. Levit. cap. 13. Numb. cap. 5. Regiſt. F. N. B. 234. Bre. de leproſo amovendo Bract. lib. 5. f. 421. a. Brit. fo. 39. 88. Fleta, li. 6. ca. 39. 22 E. 3. Rot. Clauſ. 2. parte, nu. 14.

Here is a rare proviſo, That no attainder of felony by vertue of this act, ſhall extend to any attainder, or corruption of blood, or forfeiture of goods, chattels, lands, tenements, or hereditaments.

In this proviſo theſe things are to be obſerved: firſt, that by the avoyding of the corruption of blood, the wives dower is impliedly ſaved: for where the heir ſhall inherit, the wife ſhall be endowed againſt the heir. Secondly, that there ſhall be * no forfeiture of goods, or chattels, which is rare, and the like we have not obſerved before, and by conſequent the offender may make his will and teſtament, and if he doe not, the ordinary ought to grant adminiſtration of the goods and chattels, as he ought to doe in other caſes. * Nota.

Theſe words [to any attainder or] muſt be omitted, and the ſenſe to be, to any corruption of blood, for (as it is printed) it is, that no attainder of felony ſhall extend to any attainder, &c.

This act is become of no force for want of continuance, and is expired ſince we wrote this chapter, therefore to be put out of the charge of the juſtices of peace.

CAP.

CAP. XXIX.

Of Felonie in Jaylers by Dures of Impriſonment, &c. by Statute, and by the Common Law.

14 E. 3. ca. 10. Geol in French is a priſon. Geolier a keeper of a priſon. Anglice, a jayl, or jayler.

* An approver. 3 E. 3. Cor. 295.

IF it happen that the keeper of the priſon, or underkeeper (1) by too great dures of impriſonment (2), and by pain make any priſoner that he hath in his ward to become an * appellor (3), againſt his will (4), and thereof be attainted, he ſhall have judgement of life and member (5).

Before the making of this ſtatute, if a jayler had by dures of impriſonment made his priſoner become an approver, to appeal honeſt men for his own private, of intent to have of their goods, when they were committed to his cuſtody, and to retain them in priſon without being let to mainprize, and the appellees upon his appeal be hanged: this is felony in the jayler by the common law: but if the appellees were acquitted, then it was no felony, but a great miſpriſion in the jayler, which was one of the cauſes of the making of this act: for by this act, if the priſoner become an approver againſt his will, whether the appellees be acquited, or attainted, or after the approvement not proceeded with, and whether the approvement be true or falſe, ſo it be by dures of impriſonment, and againſt the will of the priſoner, it is felony. * For it is not lawfull for any man to excite or ſtir any other to a juſt accuſation, complaint or lawfull ſuit, for *culpa eſt ſe immiſcere rei ad ſe non pertinenti*; (and ſo was [a] it reſolved Mich. 7. Ja. in the ſtar-chamber, in ſir John Hollis his caſe, by the whole court) much more to doe it by dures of impriſonment, moſt of all by a jayler, who hath the cuſtody of the priſoner committed to him, to enforce him by dures to become an approver. And therefore this law hath made it felony in the jayler or under-jayler.

18 E. 3. Cor. 272.

* 1 E. 3. ca. 14. 20 E. 3. cap. 5. 1 R. 2. ca. 4. W. 1. cap. 36. 11 H. 4. 2. 91. 22 E. 3. 15. See the expoſition of W. 1. c. 28.

[a] Mich. 7 Jacobi in curia ſtellat. Sir John Hollis caſe.

(1) *Keeper of the priſon, or under-keeper.*] If he be keeper, or under-keeper, *de jure*, or *de facto*, by right or by wrong, he is within the purvien of this ſtatute. **

11 H. 4. 73. ſimile. 13 E. 3. bar. 253. ſimile.

* W. 2. cap. 34. 28 E. 3 ca. 3. 13 R. 2. ſtat. 2. cap. 3. 1 E. 2. De frang. priſonam. 9 E. 4. fo. 26. Br. Cor. 203.

(2) *By too great dures of impriſonment.*] Every impriſonment is taken and deemed in law *duritia*, *dures*: a little addition to it by the jayler is too great dures in this caſe.

(3) *To become an appellor.*] That is an approver.

(4) *Againſt his will.*] That is, when the priſoner never would have done it of his own will, if the jayler, or under-jayler had not enforced him thereunto.

(5) *Judgement of life or member.*] * Theſe words doe imply felony. For this offence, the offender ſhall have the benefit of his clergy.

[b] If the jayler keep the priſoner more ſtraitly then he ought of right, whereof the priſoner dyeth, this is felony in the jayler by the

[b] Britton, fo. 18. Fleta, lib. 1, c. 26. verſus finem. Mirror cap. 1. §. 9 De homicidio.

the common law. And this is the cauſe, (as before hath been ſaid) that if a priſoner die in priſon, the coroner ought to ſit upon him. See before cap. Petit Treaſon, fo. 34. how priſoners are to be demeaned.

How gaoles are rejoyned and united to the office of ſherifs, ſee this ſtatute of 14 E. 3. ca. 10. 19 H. 7. ca. 10. lib. 4. fo. 34. Muttons caſe. Adde thereunto Rot. Parl. 18 E. 3. nu. 43. and ſo was it decreed in Forteſcues caſe, in the exchequer chamber, *anno* 2. Car. regis. [92]

14 E. 3. ca. 10.
19 H. 7. c. 10.
Li. 4. fo. 34. Muttons caſe.
Parl. 18 E. 3. nu. 43. 2 Car. Regis in the exchequer chamber, Forteſcues caſe.

CAP. XXX.

Of Felony by bringing in, Payment, or Receipt of certaine Money.

IT is felony to make, coin, buy, or bring in, and put in payment, &c. any galley half pence, ſuſkyn, or dotkyn.

3 H. 5. cap. 1. Stat. 1. Raſt. Abb. tit. Money nu. 27.

The reaſon of this law was, for that theſe moneys were baſe, and not of the allay of ſterling, which was (amongſt others) the cauſe of the making of the generall law of 9 H. 5. cap. 6. ſtat. 2.

9 H. 5. c. 6. Stat. 2.

It is felony to pay, or receive for payment any money called blanks. For the better underſtanding of this ſtatute, it is to be known, that theſe blanks were white money coyned by king H. 5. in France after his victory at Agincourt, and league with France, whoſe ſtyle then was, *rex Angliæ, regens et hæres Franciæ.* And they were called blanks or whites in reſpect of the colour, becauſe at the ſame time he coyned alſo a ſalus in gold, the ſalus, being of the value of twenty two ſhillings, was of the allay of ſterling: but the blanks, which were much more common, being each of them valued at eight pence, were not of the allay of ſterling, and therefore they only were decried by the ſaid act of 2 H. 6.

2 H. 6. ca. 9.

See the ſecond part of the Inſtitutes. Artic. ſuper Cartas cap. 20.

For either of theſe offences of felony the offender may have his clergy.

CAP.

CAP. XXXI.

Of Felony for Tranſportation of Silver, or Importation of falſe or evill Money, &c.

Mirror, c. 1. §. 3. Inter les articles de viels roys ordeins.
Rot. Parl. 17 E. 3. nu. 15. not printed.

DEFENDUE fuit que nul argent ſerra tranſport hors del realm.

This was the ancient law of England long before the conqueſt.

At the parliament holden *anno* 17 E. 3. as well the tranſportation of ſilver, as the importation of falſe and evill money, is enacted by authority of that parliament to be felony. And alſo if the ſearchers mentioned in the act be aſſenting to the bringing in of falſe money, or willingly ſuffering ſilver or money to be tranſported, it is alſo made felony. But becauſe this act was never printed nor tranſlated into Engliſh, and for that there be other things obſervable, enacted thereby, worthy to be known, we will tranſcribe the ſame, *de verbo in verbum in proprio idiomate.*

* Le parliament tenus a Weſtm. a la quinzeme de Paſch. du raign noſtre ſeignior le roy Edward tiers apres le conqueſt dys et ſeptiſme.

[a] See Britton cap. 5. fo. 10. b. Ceſt allay eſt ſolonque le forme et uſage del realm.
Mirror. ca. 1 §. 3. before the conqueſt.
& cap. 1. §. 6.
& cap. 5. §. 1.
See inter leges Æthelſtani. c. 14. Canuti ca. 8. Fleta, lib. 1. ca. 22. Glanv. li. 14. c. 7. Of what weight and allay the kings money ſhall be.
25 E. 3. ca. 13.
9 H. 5. ca. 11.
See before cap. Treaſon. Verb. *Sa monye.*
See the ſecond part of the Inſtitutes. Artic. ſuper cartas cap. 20.

ITEM accorde eſt de faire une monoie des bones eſterlings en Engleterre du pois et del [a] alay del auncient eſterling, que avera ſon cours en Engleterre entre les grandz et la comune de la terre, et la quele ne ſerra portes hors du royalme dengleterre en nulle manere, ne pur quecunque cauſe que ceo ſoit. Et en caſe que les Flemings voillent faire bone monoie dargent groſſes ou autres accordant en alay es bones eſterlings, que tiel monoie eit cours en Engleterre entre merchand et merchand et autres qi la vodroient reſceuire de lour bone gree, iſſint que nul argent ſoit portes hors du roialme.

Item eſt accordes et aſſentus, que bones gents et loialx ſoient aſſignes es ports de miere, et ailours, ou mieſter ſerra, de faire la ſerche que nul argent ſoit portes hors du roialme en monoie n'autrement, forſpris que les grandz quant ils vont per dela qils penſent aver veſſeals dargent pur ſervir lour hoſtels: Et que nul ſoit cy hardy [b] de porter fauſſe et malvois monoie en roialme, ſur paine de forfeiture de vie et de membre, et a faire eſchange a ceux qi paſſeront la miere d'or pur lour tones Eſterlings a la value.

[b] This is felony. See the like in the ſecond part of the Inſtitutes. 1 E. 2. De frangentibus priſonam. 14 E. 3. 10. &c.

Item aſſentus eſt et accordes, que les dits ſercheours, per cauſe qils ferront lour offices plus diligement et plus loialment, [c] ils eient la tierce partie de tote la fauxe monie, qils purront trover

[c] The reward of the ſearchers if they be diligent, &c.

* portee

portee deins le roialm a lour proffit demeen: et en meſme la manere eient la tierce partie de la bone monoie quele ilz troveront en la miere paſſent hors de la terre. Et en caſe qils ſoient troves negligents ou rebealx a tieux ſerches faire, [d] *que lour terres et tenements, biens et chateux ſoient ſeiſes en la main le roy, et lour corps pris, et detenus tanque ils eient fait fine au roy pur lour diſobeiſance. Et en caſe quils ſoient* [e] *aſſentants de porter tiels fauxe monoie, et de ſueffrire ſachantement largent ou monoie autrement, (forſpris que les grandz quant ilz vont per dela qils penſent aver veſſeals dargent pur ſervir lour hoſtels come de ſuis eſt dit) eſtre meſnes hors du roialme, eient judgement de vie et de membre.*

[d] the puniſhment of them if they be negligent, &c.

[e] Their aſſent to the bringing in of falſe money, or wittingly to ſuffer ſilver, or money, &c. to be tranſported, is felony.

Item, IT is accorded to make money of good ſterling in England of the weight and allay of the ancient ſterling, which ſhall be currant in England between the great men and commons of the land, and the which ſhall not be carried out of the realm of England in any manner, nor for any cauſe whatſoever. And in caſe, that the Flemings will make good money of ſilver groſſe or other, according, in allay of good ſterling, that ſuch money ſhall be currant in England between merchant and merchant, and others, who of their own accord will receive the ſame, ſo that no ſilver be carried out of the realm.

[94]

Item, It is accorded and aſſented, That good and lawfull men be aſſigned in the ports of the ſea, and elſewhere, where need ſhall be, to make ſearch, that no ſilver be carried out of the realm in money or otherwiſe, (except that the great men may when they goe out of the realm, have ſilver veſſels to ſerve their houſes) and that none be ſo hardy to bring falſe and ill money into the realm upon pain of forfeiture of life and member, and to make exchanges with them, that ſhall paſſe the ſea, of gold for their good ſterling to the value.

Item, It is aſſented and accorded, that the ſaid ſearchers, becauſe they may doe their offices more diligently and more lawfully, ſhall have the third part of all the falſe money that they can find to be brought into the realme for their own benefit; and in the ſame manner they ſhall have the third part of the good money which they ſhall find upon the ſea paſſing out of the realm. And in caſe they ſhall be found negligent or diſobedient in making ſuch ſearches, that their lands and tenements, goods and chattels ſhall be ſeiſed into the kings hands, and their bodies taken and detained untill they have made fine to the king for their diſobedience. And in caſe they ſhall be aſſenting to the bringing in of ſuch falſe money, or wittingly ſhall ſuffer ſilver or money (except veſſels of ſilver for the great men when they goe out of the kingdome to ſerve in their houſes, as before is ſaid) to be tranſported out

out of the realme, they ſhall have judgement of life and member.

The offenders in caſe of felony made by this act may have the benefit of their clergy.

[95]

CAP. XXXII.

Of Felonie for carrying of Wooll, Woolfels, Leather, or Leade out of the Realme.

27 E. 3. cap. 3. the ſtatute of the Staple.

NO merchant, Engliſh, Welch, or Iriſh, ſhall carry any manner of wools, leather, woolfels or lead, out of the ſaid realme and lands, upon paine of forfeiture of life and member, nor ſhall tranſport any of the ſaid wares or merchandizes in the name of merchant ſtrangers, nor ſhall ſend or hold their ſervants, &c. in the parts beyond the ſea to ſurvey the ſale of the ſaid wares or merchandizes, or to receive the money coming of the ſale of the ſame, nor take payment of gold or ſilver, nor of any other thing in recompence or commutation, or in the name of payment in the parts beyond the ſea out of the realme and lands aboveſaid of merchandizes ſold in England, Ireland, or Wales, touching the ſtaple, but that all ſuch payment ſhall be made in gold or ſilver, or merchandizes in England, Ireland, or Wales, where the contract was made, upon paine of life and member.

Mirror, cap. 1. § 3. Inter les artic. per vieles royes ordeins. Defendu que nul de ameſnaſt leyne hors del realme.

Cap. 11. That no merchant privie nor ſtranger, nor any other, of what condition that he be, go by land or by water towards wines, or other wares or merchandizes coming into our ſaid realme or lands, in the ſea, nor elſewhere to foreſtall or buy the ſame, or in other manner to give earneſt upon them, before that they come to the ſtaple, or to the port where they ſhall be diſcharged; nor enter into the ſhips for ſuch cauſe, till the merchandizes be ſet to land to be ſold, upon paine of loſſe of life and member.

Cap. 12. No merchant privie, ſtranger, or other ſhall carry out of our realme of England, wools, leather, or woolfels to Barwick upon Twede, nor elſewhere, nor into Scotland upon the like paine, nor that any merchant, nor any other ſell his wools, woolfels, or leather, to any of Scotland, nor to any other to carry into Scotland: upon the like paine.

Cap. 18. If the merchants or other people of Ireland or Wales, after they be in the ſea with their merchandizes, do paſſe to any place, other then to the ſtaples in England: it is felony.

No

No merchant, or other ſhall make any conſpiracie, confederacy, &c. or ill device in any point, that may turn to the impeachment, diſturbance, defeating, or decay of the ſtaples, &c. and if any do, and be thereof attainted before the major and miniſters of the ſtaple, or other whom the king ſhall aſſigne, he ſhall incurre the paine of loſſe of life and member. Cap. 25.

Item, *ou auterfoitz fuit orden en * leſtatuts de leſtaple que nul Englois paſſera la mere ove leynes, quire, pealtz lanuts, ne per auter, ſur peine de forfeiture de vie et member, terres et tenements, biens et chateux; eſt accord que la forfeiture de vie et member ſoit ouſte de tout en leſtatute de leſtaple, et que nul home ſoit impeach por tiel forfeiture de vie et member, cibien in temps paſſe come avenir, la forfeiture des terres et tenements, biens et chateux eſteant en ſa force.* The ſame in Engliſh. 38 E. 3. cap 6. 27 E. 3. ca. 3, &c. ſtat. Stapulæ. [96]

Alſo, where heretofore it was ordained in the ſtatutes of the ſtaple, that no Engliſh man ſhould paſſe the ſea with wools, leather, woolfels, nor by other, upon paine of forfeiture of life and member, lands and tenements, goods and chattels. It is accorded that the forfeiture of life and member be ouſted in the whole in the ſtatute of the ſtaple, and that no man be impeached by ſuch forfeiture of life and member, as well in times paſt, as to come, the forfeiture of the lands and tenements, goods and chattels, being in his force.

By the expreſſe letter of the body of this law, the forfeiture of life and member is ouſted *de tout* in the ſtatute: therefore it is holden, that the felony is taken away throughout the ſtatute, but the forfeiture of lands and goods remaineth by the expreſſe letter of this act.

By the ſtatute of 18 H. 6. no man ſhall carry wool, or woolfels, out of this realme to other places, then to the ſtaple at Callice, without the kings licenſe, upon paine of felony, &c. And that as well commiſſioners aſſigned, as the juſtices in every county where ſuch wools and woolfels ſhall be ſo carried out, have power and authority to enquire of the premiſes, and them to hear, and determine, &c. 18 H. 6. cap. 15. Stanf. Pl. Cor. 37. b.

But this act extendeth not to wools which ſhall paſſe the ſtraît of Marroke. And this is a perpetuall law, and cannot be expired, as it is ſuppoſed in the laſt impreſſion of the ſtatutes at large, but it extendeth only to wools and woolfels. The offender herein may have his clergie.

And for the better underſtanding of ancient ſtatutes and records concerning wools, it is neceſſary to explaine certaine words and termes. By the ſtatute of 25 E. 3. cap. 9. a ſack of wool containes but twenty ſix ſtone, and every ſtone fourteen pound, where before it was [a] twenty eight ſtone.

Pochet of wool, *unde poſnettum*, that is, a little poke or ſack containing halfe a ſack of wool. Sarpler, *unde ſarpleia*, is alſo halfe a ſack, and is derived from the French word *ſarpillier*, which ſignifieth

[a] Compoſ. de ponderibus vet. Mag. Carta, 2 part. fo. 31. Saccus lanæ. Rot. Parl. 27 E. 3. nu. 53.

nifieth a wrapper, within which wrapper halfe a ſack is contained.

[b] Compoſit. de ponderibus, ubi ſupra.

[b] A weigh of wool, *unde waga*, is halfe a ſack.

A tod or toit of wool, *unde toddum lanæ*, containeth two ſtone, and is derived from the French word *toilet*, which is a wrapper, within which by uſage two ſtone of wooll is foulded: ſome fetch it from the Flemmiſh word *dodderem*, which ſignifieth *nectere*, to weave, becauſe it is woven into cloth. *Petra lanæ* is a ſtone of wooll, ſo called, becauſe the weight, being a ſtone, containes fourteen pound.

[97]

CAP. XXXIII.

Againſt Tranſportation of Iron, Braſſe, Copper, Latten, Bell-metall, Pan-metall, Gun-metall, or Shroofe-metall, (Tinne and Lead only excepted.)

28 E. 3. cap. 5. 33 H. 8. cap. 7. 2 E. 6. cap. 37. See the penalties in the ſtatutes themſelves, which are thought to be too weak.

THE tranſportation of theſe are prohibited by divers acts of parliament upon the penalties therein expreſſed. And hereby is prohibited the tranſportation of any gunnes whatſoever, a neceſſary law, and worthy of due execution.

Ferrum a feriendo. Timber is a Saxon word, in old French, Marem, unde Maremium, Latine, ligni materia, vel lignum ædificatorium.

And we have obſerved, that God hath bleſſed this realme with things for the defence of the ſame, and maintenance of trade and traffick, that no other part of the Chriſtian world hath the like: viz. Iron to make gunnes, &c. more ſerviceable and perdurable then any other. Secondly, timber for the making and repairing of our navie, and eſpecially of the knees of the ſhips, better then any other. Thirdly, * our fullers earth is better for the fulling of our cloth, then any other. Fourthly, our wooll makes better cloth, and more laſting and defenſible againſt winde and weather, then the wooll in any nation out of the kings dominions; and many other ſpeciall gifts of God.

* Terra fullonica.

But here will we ſtay, and pray, that none of theſe may be tranſported for many inconveniencies, that will follow thereupon.

CAP. XXXIV.

Of Felony for ſtealing of a Faulcon.

37 E. 3. cap. 19.

EVERY perſon (1) that findeth (2) any falcon (3), tercelet (4), lannner, or laneret (5), or any other falcon, that is loſt of his lords (6), that forthwith he ſhall bring it to the ſherif of the county, and that the ſherif make proclamation (7), &c. and if any ſteal any hawk (8), and the ſame

carry

carry away not doing the ordinance aforeſaid, it ſhall be done of him as of a thief that ſtealeth a horſe (9) or other thing.

The ſtatute of 34 E. 3. inflicted the penalty for the concealing and taking away of the hawk, two years impriſonment, and the price of the hawk to the lord, if he hath wherewith, and if not, he ſhall the longer abide in priſon. This act of 37 E. 3. maketh the offence felony. 34 E. 3. cap. 22.

The new printed book of the ſtatutes at large, in ſtead of theſe words, (or any other falcon) hath, or any other hawk. Printed for the ſociety of ſtationers, 1618.

I have ſeen ſome manuſcripts (in theſe words) in the original tongue, wherein the ſtatute was publiſhed. *Que quecunque perſon que trove faucon, tercelet, lanier, ou lanyret, auſtor ou auter faucon.* And both theſe differ from the truth of this law. For the firſt extendeth this act to any hawk whatſoever. And the manuſcript to *auſter* or *autor*, a goſhawk, whereas in truth, this law extendeth only to ſuch as be of the kinde of faulcons, being long winged hawks, which many times by flying far off are loſt, and not to any ſhort-winged hawk, as the goſhawk, the tercel of the goſhawk, the ſparhawk, &c. And in the body of the act this word (faulcon) is ever uſed, and not this word (hawk) as hereafter appeareth. We would have been glad to have cleared this point by the record of the parliament roll, but the roll of this act is not to be found, and yet being a generall law, the judges are to take notice thereof: and that which I have ſet down, as the words of the law, agreeth with the firſt impreſſion thereof, and with all ſucceeding impreſſions ſaving the laſt. See hereafter, cap. Larceny, verb. Perſonall goods, &c. [98] Lib. 8. fo. 27, 28. In caſu principis.

(1) *Every perſon.*] This is a generall law, and extendeth to all perſons of what degree or ſex ſoever.

(2) *That findeth.*] Note by the common law the felonious taking of any hawk long-winged, or ſhort-winged, from the peark, &c. or from the perſon of any man, with a mind to ſteal her, is robbery: but the finding of a faulcon, though he concealed, denied, or ſold her, was no felony, but by this act.

(3) *Any faulcon.*] By this and the laſt words, or any other faulcon, it appeareth that only faulcons are within this law, as beſides thoſe that are here named, the gerfaulcon, *girefalco*, or *ardearius*, and the tercell, which is called a jerkin; and the lanner is called *falcunculus*. But the merlyn, which is called *æſalo*, and the hobby which is called *alaudaria*, though they be long-winged hawks, yet being not of the kind of faulcons they are not within this ſtatute, neither is any ſhort-winged hawk, as the goſhawk, the tercell of the goſhawk, or the ſparhawk, &c. as has been ſaid, within this act.

(4) *Tercelet.*] This is the tercell of the faulcon, called a tercell gentill, the male of the faulcon called *terciolus, quia tertia parte minor ſit femella*, becauſe the tercell is a third part leſſe then the female.

(5) *Lanner and laneret.*] Theſe (as hath been ſaid) are of the kind of faulcons, which appeareth not only by the name *falcunculus*, but by the words of the act, for having named the lanner and laneret, it is ſaid, or any other faulcon.

Albeit theſe hawks, that ſhall be ſo loſt, have no vervels, yet

muſt the finder carry them to the ſherif, for vervels are not required by this act. The only thing that the finder is to doe, to ſave himſelf from felony, is forthwith (the word in the originall is *maintenant*) after his finding to carry the hawk to the ſherif.

(6) *That is loſt of his lords.*] Lords are taken here for the owners, the word in the original is *ſeignior*, which ſignifieth as well a proprietary, as a lord.

10 E. 4. 1. 7 R. 2. barre 241. Lib. 5. fo. 108. Sir Hen. Conſtables caſe.

(7) *To prove reaſonably.*] This is not intended according to the generall ſenſe of this word (proof) that is, by a jury of twelve men, but (reaſonably,) that is, by vervels, or by marks, or by other proof to the ſherif.

(8) *And if any ſteal any hawk, &c.*] The concealing and carrying away of the hawk, not bringing the ſame to the ſherif according to this ordinance, is adjudged a ſtealing by this act. And yet if a man finde goods, and conceal or deny them, it is no felony.

14 El. Dier, 307. Fines caſe. Lib. 7. fo. 17. in caſe de Swans.

(9) *As of a thief that ſtealeth a horſe.*] But yet by the common law one hath not as good and abſolute a property in hawks, being *feræ naturæ*, and reclaimed for delight and pleaſure (for they may become wild again, and return to their naturall liberty) as in a horſe, or any other thing of profit: but the concealing and carrying away of the hawk reclaimed, being found was no felony before this ſtatute, no more then any thing of profit, becauſe the party came to the hawk by finding. See more hereof in the chapter of larceny. A hawk that is not reclaimed is *nullius in bonis*, but *occupanti conceditur*, and he that firſt getteth the hawk enjoyeth it.

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In this act four things are to be obſerved. Firſt, that the ſherif muſt make proclamation in all the good towns of the county that he hath ſuch a faulcon in keeping. Secondly, if none come to challenge the faulcon within four months, if the finder be under the degree * of a gentleman (which here is called *un ſimple home*) the ſherif ſhall have the falcon, paying reaſonable coſts, &c. Thirdly, if the finder be a gentleman, and no challenge by the owner within four months, then he ſhall have the faulcon, paying reaſonable coſts, &c. Fourthly, it is to be obſerved, that in theſe two latter branches, the laſt printed book hath this word (hawk:) but in the originall, and all the other printed books, the word is (falcon) under which word, all the reſt mentioned in this act are included.

* Who ſhall be accounted in law a gentleman; ſee the ſecond part of the Inſtitutes the ſtatute of Additions. 1 H. 5. c. 5. See before c. 23. 3 Jac. ca. 4. verb. And that if any gent.

For this offence of felony the offender ſhall have the benefit of his clergy, for at the time of the making of this act he that had ſtoln a horſe ſhould have had his clergy. See Stanf. Pl. Coron. fo. 37.

CAP.

CAP. XXXV.

Congregations, &c. by Maſons in their generall Chapters, &c.

IT is ordained and eſtabliſhed that no congregations and confederacies ſhall be made by maſons in their generall chapters and aſſemblies, whereby the good courſe and effects of the ſtatutes of labourers are violated and broken, in ſubverſion of law; and if any be, they that cauſe ſuch chapters and congregations to be aſſembled and holden, ſhall be adjudged felons. 3 H. 6. ca. 1.

The cauſe wherefore this offence was made felony, is, for that the good courſe and effect of the ſtatutes of labourers were thereby violated and broken. Now all the ſtatutes concerning labourers before this act, and whereunto this act doth refer are repealed by the ſtatute of 5 Eliz. cap. 4. whereby the cauſe and end of the making of this act is taken away, and conſequently this act is become of no force or effect: *ceſſante ratione legis, ceſſat ipſa lex.* And the indictment of felony upon this ſtatute muſt contain, that thoſe chapters and congregations were to the violating and breaking of the good courſe and effect of thoſe ſtatutes of labourers, which now cannot be ſo alledged, becauſe thoſe ſtatutes be repealed. Therefore this would be put out of the charge of juſtices of peace written by * maſter Lambard.

2 E. 3 de ſervientibus, ca. 1. &c. 25 E. 3. De ſervientibus c. 1. &c. 5 El. ca. 4.

Ceſſante cauſa ſeu ratione legis ceſſat ipſa lex. 14 H. 7. 11. Per Fineux ſimile. 27 H. 8. 4. b. Aide ſimile 10 E. 3. 8. Account per Shard. 26 H. 6. Examination 14.

* Lambard, page 227. vide Stanf. 37. b.

CAP. XXXVI. [100]

Of Felony by bringing in of Buls of Excommunication, &c.

IF any man (1) bring or ſend into this realm, or the kings power, any ſommons, ſentence, or excommunication (2) againſt any perſon of what condition that he be, for the cauſe of making motion, aſſent, or execution of the ſtatute of proviſors (3), he ſhall be taken, arreſted, and put in priſon, and forfeit all his lands and tenements, goods and chattels for ever, and incur the pain of life and member (4). And if any prelate make execution (5) of ſuch ſommons, ſentence, or excommunication, that his temporalties be taken, and abide in the kings hand till due redreſſe and correction be thereof made. 13 R. 2. Stat. 2. cap. 3.

And if any perſon of leſſe eſtate then a prelate, &c. make ſuch execution, he ſhall be taken, arreſted, and put in priſon, and have impriſonment, and make fine and ranſome by the diſcretion of the kings councell.

By the common law when any perſon, either eccleſiaſticall or temporall, ſhould by pretext of forain power impugne or attempt to fruſtrate any of the laws of the realm, there lieth a writ called *all jura regia:* if it were by an eccleſiaſticall perſon beneficed within this realm, then the writ is.

Regiſt. fo. 61. b. *Rex, &c. ſalutem. Turbamur, nec immerito, et movemur dum illos qui ſub noſtro degunt dominio, et ibidem beneficiis et redditibus honorantur, quo prætextu in defenſione, et tuitione jurium regiæ coronæ noſtræ ipſos nos aſſiſtere condeceret, eadem jura erectis contra nos cervicibus conſpicimus ſatagentes pro viribus impugnare, &c.*

Ibidem, 60. b. The general writ is, *Rex, &c. ad jura coronæ noſtræ integra et illæſa*

Ibid. 61. b. & 62. *pro viribus conſervanda, eo amplius curam et operam adhibere nos convenit ſtudioſam quòd ad hoc eſt debito aſtringimur vinculo juramenti, et altos conſpicimus, ad ipſorum jurium enervationem anhelare:* and particularly againſt proviſions. So as proviſions, &c. were, as by theſe writs it appeareth, againſt the common law of the realm, but ſufficient puniſhment was not thereby inflicted: therefore this, and other ſtatutes were made.

And here it is worthy of conſideration, how the laws of England are not derived from any forain law, either cannon, civil, or other, but a ſpecial law appropriated to this kingdome, and moſt accommodate and apt for the good government thereof, under which it hath wonderfully flouriſhed, when this law hath been put in due execution: and therefore as by ſituation, ſo by law it is truly ſaid,

*Et penitus toto * diviſos orbe Britannos.*

* Diviſos { orbe & legibus.

(1) *If any man.*] Though theſe words be generall, yet they extend not to eccleſiaſticall perſons, becauſe there is ſpeciall proviſion for them after in the act.

(2) *Any ſommons, ſentence, or excommunication.*] Hereby are prohibited the popes buls of any ſentence or excommunication, &c. and proces of ſummons.

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It appeareth by our books that the bringing of any bull of excommunication into the realme againſt a ſubject, was againſt the common law of England, in reſpect it gave way to foraine authority. And ſo it was holden in the time of E. 1. and E. 3. &c. long before this act, and ever ſince.

11 E. 3. Certif. 6. 30 Aſſ. p. 3. 19 E. 3. Quare non admiſit. 7. Brook. Premunire 10. 11 H. 4. 69. 76. 14 H. 4. 14. 7 E. 4. 14. 20 H. 6. 1. 35 H. 6. 42. F. N. B. 64. f. Lib. 5. fo. 12. in Caudries caſe.

(3) *Or execution of the ſaid ſtatute of proviſors.*] viz: 25 E. 3. *de proviſoribus.* See 25 E. 3. cap. 22. 27 E. 3. cap. 1. 38 E. 3. ſtat. 2. cap. 1. & 4.

(4) *Incurre the paine of life and member.*] [a] That is, of felony, as hath been often ſaid before. This puniſhment is altered by the ſtatute of 13 Eliz. cap. 2. as hereafter in this chapter ſhall appeare.

[a] W. 2. cap. 24. 1 E. 2. de frang. priſonam. 28 E. 3. cap. 3. 13 R. 2. ſtat. 2. ca. 3. 9 E. 4. 26. Br. Cor. 203.

(5) *And if any prelate make execution, &c.*] This and the next following branch extend to eccleſiaſticall perſons. The puniſhment in both theſe branches, and in the former alſo is altered by the ſtatute of 13 Eliz. cap. 2. For thereby this offence is made high treaſon,

ſon, [b] as well in perſons eccleſiaſticall, as temporall: which act, and the cauſe of the making thereof you may reade in the caſe *de jure regis eccleſiaſtico, ubi ſupra.*

[b] Lib. 5. f. 35, 36, &c. De jure regis eccleſ.

CAP. XXXVII.

Of Felony in receiving a Jeſuite, Seminary Prieſt, &c.

EVERY perſon which ſhall wittingly and willingly receive, relieve, comfort, or maintaine any jeſuite, ſeminary prieſt, or other prieſt, deacon, or religious, or eccleſiaſticall perſon (made by authority from the ſee of Rome ſince the feaſt of Saint John Baptiſt, an. 1 Eliz. borne within this realme) being at liberty and out of hold, knowing him to be a jeſuite, &c. ſhall for ſuch offence be adjudged a felon without benefit of clergie. 27 Eliz. cap. 2. Clergie taken away.

The cauſe of the making of this ſtatute of 27 Eliz. againſt jeſuites and ſeminary prieſts, &c. and their receivers, you may reade at large, lib. 5. fol. 38, 39, in the caſe *De jure regis eccleſiaſtico.*

CAP. XXXVIII. [102]

Of Felony in Recuſants concerning Abjuration.

IF any recuſant) other then a Popiſh recuſant or a feme covert) which by the tenor and intent of this act is to be abjured, ſhall refuſe to make abjuration, or after ſuch abjuration made ſhall not goe to ſuch haven, and within ſuch time, as is by this act appointed, and from thence depart out of the realme, according to this preſent act, or after his departure ſhall returne into any of her majeſties realmes or dominions, without her majeſties ſpecial licenſe in that behalfe firſt obtained; that then every ſuch perſon ſo offending, ſhall be adjudged a felon. 35 Eliz. cap. 1.

If any offender againſt this act before he or they be required to make abjuration, repaire to ſome pariſh church, on ſome Sunday or feſtivall day, and then and there heare divine ſervice, and make ſuch ſubmiſſion as by the act is preſcribed; then the ſaid offender is clearly to be diſcharged.

The offender ſhall forfeit his goods and chattels, and his lands during his life only, the offence ſhall work no loſſe of dower or corruption of blood, and the heire to inherit. The offender ſhall not have the benefit of his clergie.

CAP. XXXIX.

Of Felonie in Egyptians, &c.

1 & 2 Ph. and Mar. cap. 4. 5 Eliz. cap. 20.

IF any outlandiſh people, calling themſelves, or being called Egyptians, ſhall remaine in this realme, or in Wales, one moneth, at one or ſeverall times: and if any perſon being fourteene yeares old, which hath been ſeen or found in the fellowſhip of ſuch Egyptians, or which hath diſguiſed him or herſelfe like to them, ſhall remaine here or in Wales by the ſpace of one moneth, either at one or ſeverall times, it is felony.

The offender ſhall not have the benefit of his clergie.

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CAP. XL.

Of Felonie in dangerous Rogues.

39 Eliz. cap. 4. 1 Jac. cap. 7. 25.

IF any dangerous rogue that was baniſhed the realme or adjudged perpetually to the gallies, have returned into the realme without lawfull licenſe or warrant, it is felony: the felony to be tried where the offender is apprehended.

The offender may have the benefit of his clergie.

39 Eliz. cap. 4. 1 Jac. cap. 7.

If any rogue after he hath been branded in open ſeſſions with a Roman R. upon the left ſhoulder, or ſent to the place of his dwelling where he laſt dwelt by the ſpace of a yeare, or the place of his birth, to be placed in labour, have offended againe in begging, or wandering contrary to the ſaid ſtatutes, it is felony, to be tried in the county where the offender ſhall be taken.

The offender againſt this branch ſhall not have the benefit of his clergie.

Deut. ca. 15. v. 4. Mirr. cap. 1. § 3. Interles Art. per viels royes ordeins.

Mendicus non erit inter vos, there ſhall be no begger among you. *Ordeine fuit que les povres fuiſſent ſuſteinus per les parſons, rectors, et les parochians cy que nul ne moruſt per default de ſuſteinance.*

See

See an ancient ordinance in 50 E. 3. concerning ribauds and ſturdy beggers, that they be driven to their occupations or ſervices, or to the place from whence they came. Rot. Par. 50 E. 3. nu. 61. Brit. 49. b.

CAP. XLI.

Of Felonie by Forgerie in the ſecond Degree.

IF any perſon or perſons being once condemned of any of the forgeries mentioned in the act, ſhall after ſuch his, or their condemnation, eft-ſoones commit or perpetrate any of the ſaid offences in forme in the ſaid act mentioned, that then every ſuch ſecond offence ſhall be adjudged felony. But no attainder of this felony ſhall extend to take away dower, nor to corruption of blood, or diſheriſon of the heire. 5 Eliz. cap. 14.

In 43 Eliz. Markham was attainted of felony upon this branch in the kings bench for a ſecond forgery of many of the mannors and lands late of Sir Thomas Greſham knight, and was executed therefore. Markhams caſe coram rege. 43 Eliz.

* This felony is to be heard and determined before juſtices of oier and terminer, and juſtices of aſſiſe in their circuit. And albeit that juſtices of peace have power to heare and determine felonies, treſpaſſe, &c. yet are they not included under the name of juſtices of oier and terminer: for juſtices of oier and terminer are known by one diſtinct name, and juſtices of peace by another. But the juſtices of the kings bench are juſtices of oier and terminer within this ſtatute. Hil. 30 Eliz. coram rege. Lib. 9. fo. 118. b. Smiths caſe. 3 Mar. Br. tit. Oier & Term. 8.

The offender ſhall not have the benefit of his clergie.

See hereafter in the expoſition of this ſtatute for the firſt offence, where incidently there ſhall be more ſaid concerning the ſecond offence.

CAP. XLII. [104]

Of Felony for conveying of any Sheep alive out of the Realm in a ſecond Degree.

NO manner of perſon ſhall bring, deliver, ſend, receive, or take, or procure to be brought, delivered, ſent, or received into any ſhip, or bottome any rams, ſheep, or lambs, or any other ſheep alive, to be carried and conveyed out of this realm of England, Wales, or Ireland, or out of any of the queens dominions, upon pain that every ſuch perſon, their aiders, abetters, procurers, and comforters, ſhall for his 8 El. cap. 3. See the ſtatute of 3 H. 6. cap. 2.

his and their firſt offence, forfeit all his goods, and ſuffer imprisonment one whole year without bayl or mainprise; and at the years end in ſome market town in the fulneſſe of the market, have his left hand cut off, &c. And that every perſon eft-ſoons offending againſt this ſtatute ſhall be adjudged a felon, &c.

His left hand cut off.

But this act ſhall not extend to any corruption of blood, or loſſe of dower. This felony is to be heard and determined before juſtices of oier and terminer, juſtices of gaol-delivery, and juſtices of peace. And the offender may have the benefit of his clergy, as well in caſe of the cutting off his hand as in caſe of felony. See Stanford, 37. b.

CAP. XLIII.

Of Felony in Servants that imbeſill their Maſters Goods after their Deceaſe.

33 H. 6. cap. 1.

IF any of the houſhold ſervants of any perſon ſhall after the deceaſe of their lord or maſter violently and riotouſly take and ſpoil the goods which were their ſaid lords or maſters, and the ſame diſtribute amongſt them, that upon full information [a] to the chancelour of England for the time being by the [b] executors or two of them, of ſuch riot, taking, or ſpoil made, the chancelour by the advice of the chief juſtices, and chief baron, or two of them, ſhall have power to make ſo many and ſuch writs to be directed to ſuch ſheriſs, as to them ſhall ſeem neceſſary, to make open proclamation in ſuch ſort, as by the act is preſcribed, to appear in the kings bench, &c. and if any ſuch writ be retorned, &c. then if the ſaid perſon or perſons make default, then he or they making default ſhall be [c] attainted of felony.

[a] This extends to the lord keeper of the great ſeal.
[b] This extends to the adminiſtrators, and alſo, if there be but one executor or adminiſtrator.
[c] Attainted by force of this act of parliament upon default. See the like many times in the parliament rolls. Rot. Parl. 15 H. 6. nu. 14. & 15. Rot. Parl. 18 H. 6. num. 28.

The offenders ſhall have the benefit of their clergy.

CAP.

CAP. XLIV.

Of Felony in Servants that imbeſill their Maſters Goods committed to their Truſt above Forty Shillings.

EVERY ſervant to whom any caſkets, jewels, money, goods, or cattels of his or their maſter, or miſtris, ſhall be delivered to keep, that if any ſuch ſervant or ſervants withdraw him or them from their ſaid maſters or miſtriſſes (1), and goe away with the ſaid caſkets, jewels, money, goods, or cattels, or any part thereof to the intent to ſteal the ſame, contrary to the truſt and confidence in him or them put, &c. Or elſe being in ſervice of his ſaid maſter or miſtris, without the aſſent and commandment of his maſter or miſtris, imbeſill the ſame or any part thereof, or otherwiſe convert the ſame to his own uſe, with like purpoſe to ſteal it: if the caſkets, jewels, money, goods or cattels be of the value of forty ſhillings or above, ſhall be deemed and adjudged felony.

21 H. 8. ca. 7.
27 H. 8. ca. 17.
23 H. 8. ca. 2.
1 E. 6. ca. 12.
5 El. ca. 10.

Concerning the value, (to ſpeak it once for all) *tantum bona valent, quantum vendi poſſunt.*

This act extendeth not to any apprentice or apprentices, nor to any ſervant within the age of eighteen years, at the time of the offence committed.

Vide Dier, 25 H. 8. fol. 5.

Dier, 25 H. 8. f. 5.

By the ſtatute of 27 H. 8. the offender was ouſted of his clergy, but that act is repealed by 1 E. 6. cap. 12. So as at this day the offender may have the benefit of his clergy.

1 E. 6. ca. 12.

(1) *Shall be delivered by his or their maſter or miſtris.*] If the maſter deliver an obligation to his ſervant to receive the money thereby due, and the ſervant receive the money of the obligee, and goeth away with the ſame with intent to ſteal the ſame, this is no offence within this ſtatute, becauſe he had not the money of the delivery of his maſter: and if he had gone with the obligation with intent, *ut ſupra*, it had been alſo out of this act, becauſe it was a choſe in action. So if the maſter deliver to his ſervant wares or merchandiſes to ſell, and ſelleth the ſame and goeth away with the money as before, this is no offence within this ſtatute for the cauſe aforeſaid. See Stanford, 37. b.

Dier, 26 H. 8. fo. 5. a. & b. See the form of the indictment upon this ſtat. Lamb. inter Præſidentes.

CAP.

CAP. XLV.

Of Felony to cut down or break up the Powdike in Marſhland in Norff.

22 H. 8. ca. 11. 2 & 3 Ph. and Mar. cap. 19.

EVERY perverſe and malitious cutting down and breaking up of any part of the new dike called the Powdike in Marſhland in the county of Norff. or of the broken dike called Oldfield Dike by Marſhland in the Iſle of Ely in the county of Cambridge, or of any other bank being parcell of the Rinde, and uttermoſt part of the ſaid country is adjudged felony.

The juſtices of peace have power to enquire of, and to hear and determine this felony. The offender may have the benefit of his clergy.

Some ſay that this is a private act, but it is *publicum in privato*, for the danger is publike though the place be private, and doth concern multitudes of people, and the ſea is ſuch an immenſe creature, as who can withſtand it without length of time, infinite dammage, and loſſe, and extream charge and coſt.

43 El. cap. 13. * See before cap. 12. fo. 61, 62. 3 H. 7. cap. 2. Vide 1 El. 5. c. 6. ſimile de Gales. * Blackmail is explained by the act it ſelf.

See the ſtatute of 43 El. cap. 13. whereby in the counties of Cumberland, Northumberland, Weſtmerland and the B. of Dureſme * carrying away or detaining of any perſon againſt his will, or impriſoning him or them to ranſome them or to ſpoil them, upon deadly feud or otherwiſe, or ſhall receive or carry * blackmail, or give black mail for protection, &c. is made felony without benefit of clergy.

CAP. XLVI.

Of one of the Grand Enqueſt being one of the Indictors of any Perſon or Perſons of Treaſon or Felony, and diſcover openly what Perſons were ſo indicted, &c.

THIS by ſome opinion in our books was holden for treaſon, or felony, and hereof divers reaſons were yeelded.

Stanf. fo. 36. a.

Firſt, that ſuch diſcovery was againſt his oath, but that could not be the reaſon, for perjury was neither treaſon nor felony.

Secondly, others did hold, that by this diſcovery the parties indicted of treaſon or felony might flee, or eſcape, but that can be no reaſon;

reaſon; for this diſcovery without more, can neither make him principall nor acceſſory.

Thirdly, others that endeavour to confeſſe and avoid the authorities in this caſe in law, are of opinion, that in thoſe times the intent of a man, *in criminalibus*, was much reſpected, in as much as *in criminalibus voluntas reputabatur pro facto*, and that by this open diſcovery, &c. his intent appeared, that they might flee or eſcape. And now it is agreed on all parts, that at this day ſuch diſcovery is neither treaſon nor felony: and the rather, for that no perſon ever died for ſuch diſcovery. In Georges caſe, in *anno* 27 lib. Aſſ. upon his indictment he was acquited. But certaine it is, that ſuch diſcovery is accompanied with perjury, and a great miſpriſion to be puniſhed by fine and impriſonment. 18 E. 3. Cor. 272. 27 Aſſ. p. 63. Georges caſe. [107]

CAP. XLVII.

Of Larceny or Theft by the Common Law.

HAVING thus far proceeded, we are now come to larceny, which commeth from *latrocinium*, and from *latrocinie*, by contraction, or rather abuſe, to larceny.

The Mirror firſt deſcribeth larceny, and then explaineth it. *Larcine eſt priſe d'autre moeble corporelle trecherouſment contre la volunt de celuy a q. il eſt p. male egaigne de la poſſeſſion, ou del uſe.* Then doth he explaine and ſhew the reaſon of the principall words thereof. Mirror, cap. 1. § 10. De Larcenie.

Priſe eſt dit, car baile neſt my title de laroun, ne livery en le caſe.

Moeble corporelle eſt dit pur ceo q. en biens nient moebles, ou nient corporels, ſicome de tre', rents, et des advowſons de eſgliſes, ne ſe fait nul larcenie.

Trecherouſment eſt dit pur ceo q. ſi leſſeignour entende les biens eſtre ſiens, et que il les poet bien prender, en tiel caſe ne ſe fait my ceſte peche, nec en caſe ou len prent l'autrui p. la ou len entend, que il pleiſt al ſeigniour des biens, que il les prendera, mes a ceo covient enſeigner apparant preſumption et evidence.

Et ſciendum, quod furtum eſt, ſecundum leges, contrectatio rei alienæ fraudulenta, cum animo furandi, invito illo domino, cujus res illa fuerat. And then he alſo explaineth it. *Cum animo dico, quia ſine animo furandi non committitur.* Bracton uſeth not the word *latrocinium*, but *furtum*, and ſo doth Granvile. See Britton a whole chapter *de Larcyns.* And Fleta hath it thus, *Eſt autem furtum contrectatio rei alienæ fraudulenta cum animo furandi invito dno. cujus res illa fuerit*, following Bracton *totidem verbis.* Theſe deſcriptions are generally of theft, comprehending robbery, burglary, when any thing is taken, and all other latrocinies. But here larceny for diſtinction ſake is taken in a narrower ſenſe, viz. for ſingle theft or thievery, and may be deſcribed thus. Bracton, lib. 3. fol. 150. Glanvil. lib. 7. c. 17. & lib. 10. cap. 15. Britton, cap. 15. de Larcyns. fo. 22. Fleta, lib. 1. ca. 36.

Larceny, by the common law, is the felonious and fraudulent taking and carrying away by any man or woman, of the meere perſonall goods of another, neither from the perſon, nor by night in the houſe of the owner. Larcenie defined.

Now

Now let us peruſe the principáll parts of this deſcription.

See tit. Piracy, &c. Butlers caſe, 28 Eliz.

Felonious taking.] Firſt it muſt be felonious, *id eſt, cum animo furandi*, as hath been ſaid. *Actus non facit reum, niſi mens ſit rea.* And this intent to ſteale muſt be when it cometh to his hands or poſſeſſions: for if he hath the poſſeſſion of it once lawfully, though he hath *animum furandi* afterward, and carrieth it away, it is no larceny: but this receiveth ſome diſtinction, as hereafter ſhall appeare.

2 E. 3. 1.

Secondly, it muſt be an actuall taking: for an indictment, *quod felonice abduxit equum*, is not good, becauſe it wanteth, *cepit.* By taking, and not bailment or delivery, for that is a receipt, and not a taking: and therewith agreeth Glanvil. *Furtum non eſt ubi initium habet detentionis per dominum rei.*

Glanvil. lib. 10. cap. 13.

13 E. 4. 9.

But herein the law doth diſtinguiſh. For if a bale or pack of merchandize be delivered to carry to one to a certaine place, and he goeth away with the whole pack, this is no felony: but if he open the pack, and take any thing out *animo furandi*, this is larceny. Likewiſe if the carrier carry it to the place appointed, and after take the whole pack *animo furandi*, this is larceny alſo: for the delivery had taken his effect, and the privity of the bailement is determined. And ſo it is of a tun of wine, or the like, *mutatis mutandis.*

[108]

Charge.

3 H. 7. 12. 21 H. 7. 15.

Alſo there is a diverſity betweene a poſſeſſion, and a charge; for when I deliver goods to a man, he hath the poſſeſſion of the goods, and may have an action of treſpaſſe, or an appeale, if they be taken or ſtolne out of his poſſeſſion. But my butler or cook, that in my houſe hath charge of my veſſel or plate, hath no poſſeſſion of them, nor ſhall have an action of treſpaſſe or an appeale, as the bailee ſhall: and therefore if they ſteale the plate or veſſel, it is larceny. And ſo it is of a ſhepherd, for theſe things be *in onere, et non in poſſeſſione promi, coci, paſtoris, &c.*

13 E. 4. 9.

Speciall uſe.

If a taverner ſet a piece of plate before a man to drink in it, and he carry it away, &c. this is larceny: for it is no bailement, but a ſpeciall uſe to a ſpeciall purpoſe.

22 Aſſ. pl. 99. 22 E. 3. cor. 265.

Thirdly, nor by trover or finding. If one loſe his goods, and another finde them, though he convert them, *animo furandi*, to his own uſe, yet is it no larceny, for the firſt taking is lawfull. So if one finde treaſure trove, or waife, or ſtray, and convert them *ut ſupra*, it is no larceny, both in reſpect of the finding, and alſo for that *dominus rerum non apparet.*

See cap. de Treaſon. Verb. quant. home, &c. Et cap. Murder. 27 Aſſ. 40. 2 E. 3. cor. 160. Lex Inæ cap. 50. accord. Stanf. 26. c. 15 E. 2. Cor. 383. Mic. 37 E. 3. coram rege. Rot. 83 Lincolne.

Felonious implyeth, that though the taking be actuall, yet muſt it be done by ſuch perſons as may commit felony. A mad man that is *non compos mentis*, or an infant that is under the age of diſcretion, cannot commit larceny, as in another place we have ſaid.

A feme covert committeth not larceny, if it be done by the coertion of her huſband: but a feme covert may commit larceny, if ſhe doth it without the coertion of her huſband: and there it appeareth, that a man may be acceſſary to his wife, but the wife cannot be acceſſary to her huſband, though ſhe know that he committed larceny, and relieve him, and diſcover it not: for by the law divine, ſhe is not bound to diſcover the offence of her huſband.

Felons came to the houſe of Richard Dey, and Margery his wife; the wife knew them to be felons, but the huſband did not, and both of them received them, and entertained them, but the wife conſented not to the felony. And it was adjudged, that this made not the wife acceſſary, *Quia ipſa in vita mariti ſui de aliquo receptamento*

ceptamento in præſentia viri ſui, cui contradicere non potuit, occaſionari non debet.

Uxor furi deſponſata non tenebitur ex facto viri, quia virum accuſare non debet, nec detegere furtum ſuum, nec feloniam, cum ipſa ſui poteſtatem non habet, ſed vir. Bracton, lib. 3. fol. 151. b.

La feme nequedent al felon poit dire q. tout ſcavoit ele del mauvaſte ſon baron, pur ceo ne le poet ele my encuſer, ne devoit, tant come ele fuit de luy covert, &c. Briton. cap. 24. fo. 47.

Uxor autem furis non teneatur pro delicto viri, pœna enim ſuos debet tenere authores, uxor autem virum accuſare non debet, nec feloniæ ſuæ conſentire, &c. Fleta, lib. 1. ca. 36.

Felonious and fraudulent taking.] If a man ſeeing the horſe of B. in his paſture, and having a minde to ſteale him commeth to the ſheriffe, and pretending the horſe to be his, obtaineth the horſe to be delivered unto him by a replevyn, yet this is a felonious and fraudulent taking, as it was reſolved by the judges, at Catlin chiefe juſtice reported in the kings bench, Paſch. 15 Eliz. for the Replevyn was obtained *in fraudem legis.* Paſch. 15 Eliz. Vide ſtatutum.

Carrying away.] For the indictment ſaith, *felonice cepit et aſportavit.* The removing of the things taken, though he carry not them quite away, ſatisfieth this word *aſportavit.* As if a gueſt take the coverlet or ſheets of his bed, and riſing before day, take the coverlet or ſheets out of the chamber, where he lay, into the hall, to the intent to ſteal them, and went to the ſtable to fetch his horſe, and the oſtler apprehended him, and this was adjudged larceny: and the coverlet or ſheets were carried away being removed from the chamber to the hall, albeit they were ſtill in the houſe of the owner. 22 Aſſ. pl. 39. [109]

So if a mans horſe be in his cloſe, and one taketh him, and as he is carrying him away, he is apprehended, before he getteth out of the cloſe, yet this is ſufficient to make it larceny. Juſtice Dalizons Report.

Of mere perſonall goods.] It is ſaid (mere) for though they be perſonall goods, yet if they ſavour any thing of the realty, no larceny can be committed of them; as any kind of corn or grain growing upon the ground is a perſonall chattell, and the executors of the owner ſhall have them, though they be not ſevered, but yet no larceny can be committed of them, becauſe they are annexed to the realty. So it is of graſſe ſtanding on the ground, or of apples, or any other fruits upon trees, or buſhes, or of woods growing; but if the owner cut the graſſe, or gather the fruit, or cut the wood, then larceny may be committed of them. 12 E. 3. Cor. 199. 22 E. 3. Ibid. 256. lib. 4. fo. 19.

So it is of a box or cheſt with charters, no larceny can be committed of them, becauſe the charters concern the realty, and the box or cheſt though it be of great value, yet ſhall it be of the ſame nature the charters be of: *et omne majus dignum trahit ad ſe minus.* 10 E. 4. 14. lib. 8. fo. 33. b. Caleys caſe.

No larceny can be committed by taking, and carrying away of a ward, or of a villain, becauſe they are in the realty.

It appeareth by all our ancient authors *ubi ſupra*, and by the ſtatute of W. 1. that there is grand larceny, and petit larceny, diſtinguiſhed ſo by the value: for if the perſonall goods ſtoln amount to above the value of twelve pence, then is it grand larceny, and if it be under the value of twelve pence, then it is petit larcency, for which W. 1. ca. 15. See the expoſition thereof. 27 H. 8. 22. Coriũ ſo ris ſacere or perdere Sax. *tholiæ*, *bis bide* is to be

whipt. Mirror ca. 4. §. De crime de robbery.

which he ſhall forfeit all his goods, and ſuffer ſome corporall puniſhment, as whipping, &c.

And this was the ancient law before the conqueſt, for the Mirror ſaith, *Et tout ſoit que la ley ne eyt regard forſque al ceures des peuchers nequident linit le quantitie del robbery et larceny en ceſt manner, ceſtaſſavoir que nul ad judgement de la mort, ſi non larceny, &c. ne paſſont 12 deniers de ſterlings.*

Lib. 7. fo. 18. In caſe de Swans.

A man hath a mere property in ſome things that are tame by nature, and yet in reſpect of the baſeneſs of their nature, a man ſhall not commit any larceny, great or ſmall, though he ſteal them, as of maſtifs, bloud-hounds, or of other kind, dogs or of cats, nor of ſome things that be [a] wild by nature, and made tame, as bears, foxes, apes, monkies, polcats, ferrets, and the like; and yet no manner of felony can be committed on them, in reſpect of their wild and ſavage nature, and therefore no perſon ſhall die for them: and likewiſe it is of their whelps, or calves, or young; for it is a rule in law, that if no felony can be committed of any thing that is *ferum natura*, and of age being reclaimed, or made tame, that no felony can be of the young in the neſt, kennell or den.

[a] Vide verb (of another) next following. 12 H. 8. 39. 14 H. 8. 3. 4. 18 H. 8. 2. 2 E. 2. diſtres 20 leveret. 2 E. 2. Avowry. 182. ferret. 38 E. 3. 10. 47 E. 3. 10. 5 H. 5. 1. 9 H. 6. 2. F. N. B. 87. a. and 88. I. 86. l.

[b] So as a man may have property in many things, and yet in reſpect of their nature there can be no felony of them. On the other ſide, of ſome things that be *feræ natura*, being reclaimed, felony may be committed in reſpect of their noble and generous nature and courage, ſerving *ob vitæ ſolatium* of princes, and of noble, and generous perſons, to make them fitter for great employments: As all kind of faulcons, and other hawks, if the party, that ſteals them know they be reclaimed.

[b] Mirror c. 1. § 10. Dier 14 El. 306, 307. 18 E. 4. 8. 16 E. 4. 11. 14 H. 8. 4. Vide before.

Of another.] [c] No larceny can be committed of wild beaſts, or of fowls that be wild, or of fiſhes that be at their naturall liberty in rivers, or great waters, becauſe theſe be *nullius in bonis*: but larceny may be committed of young pigeons in dovehouſes, or of young hawks in the neſt. But if any perſon upon the ground of any other, doe take the egs of any faulcon, goſhawk, lanner, or ſwan out of the neſt, this is not felony, [d] but he ſhall be impriſoned by the ſpace of a year and a day, and fined at the kings will, the one half to the king, and the other to the owner of the ground. But larceny may be committed of the egs of ſuch as be *domitæ natura*, as of hens, turkies, pehens, and the like. [a] And larceny may be committed of fiſhes in a trunk or pond, becauſe they are not at their naturall liberty, but as it were beaſts in a pownd.

[c] 18 H. 8. 2. b. Doct. & Stu. 9. b. Britton, 74, 75. Bract. l. 2. fo. 9. 8 E. 4. 5.

[d] 11 H. 7. ca. 17. 31 H. 8. ca. 12.

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[a] Stanf. 25. c. 12 E. 4. 4. 18 E. 4. 8. 22 H. 6. 59. 43 E. 3. 24. Vide before, verb. (Of meer perſonall goods) 3 H. 6. 55. lib. 5. fo. 104. b. lib. 7. fo. 16, 17.

[b] But if ſuch as be wild, that ſerve for the food of man, be made tame, as deer, wild bore, conies, cranes, pheſant, partridge, or the like, larceny may be committed of them, ſo as he that ſtealeth them know that they be tame. But the deer, &c. being wild, yet when he is killed larceny may be committed of the fleſh, and ſo of pheſant, partridge, or the like: and ſo note a diverſity between ſuch beaſts as be *feræ naturæ*, and being made tame, ſerve for pleaſure only, and ſuch as be made tame and ſerve for food, &c. which diverſity being not obſerved, hath made many men to erre.

[b] 10 E. 4. 14.

7 E. 4. 14. Stanf. 25.

A man may be indicted, *Quare bona capellæ in cuſtodia, &c.* and ſo in time of vacation, *bona domus eccleſiæ.*

At

At the aſſiſes at Leiceſter, in Lent, *anno* 10 Jac. the caſe was this, one William Huin had in the night digged up the graves of divers ſeverall men, and of one woman, and took the winding ſheets from the bodies, and buried the bodies again: and I adviſing hereupon for the rareneſſe of the caſe, conſulted with the judges at Serjeants Inne in Fleetſtreet; where we all reſolved, that the property of the ſheets was in the executors, adminiſtrators or other owner of them, for the dead body is not capable of any property, and the property of the ſheets muſt be in ſome body: and according to this reſolution, he was indicted of felony at the next aſſiſes, but the jury found it but petit larceny, for which he was whipped, as he well deſerved. 10 Jac. regis. Hains caſe. Furtum inauditum.

Nota. A felonious taking muſt be of the poſſeſſion, and not of the property removed from the poſſeſſion.

If a man doth bail, or lend his goods to another, although he hath the generall property of them, yet may he commit larceny of them, by the felonious taking and carrying them away, and in judgement of law he is ſaid in this caſe to take the goods of another: for the bailer hath *jus proprietatis*, and the bailee hath *jus poſſeſſionis*, or a ſpeciall property. 7 H. 6. 43.

The wife cannot ſteal the goods of her huſband, for they be not the goods of another, for the huſband and wife are one perſon in law, *duæ animæ in carne una*. 21 H. 6. Cor. 455. Abbridge daſſ 63.

Vide Stanf. Pl. Coron. fo. 24, 25.

To ſpeak it here once for all, if any perſon be indicted of treaſon, or of felony, or larcency, and plead not guilty, and thereupon a jury is retorned, and ſworn, their verdict muſt be heard, and they cannot be diſcharged, neither can the jurors in thoſe caſes give a privy verdict, but ought to give their verdict openly in court.

Macegriefs, fleſhmongers, ſuch as buy and ſell ſtollen fleſh, knowing the ſame to be ſtollen. Vide *Lamb. inter leges Edw. regis* fol. 140. b. *De Machecariis* derived of *mace* an old word for fleth, and *grief*, wrong or injury. Britton, fo. 71.

CAP. XLVIII. [111]

De Anno Die et Vaſto.

Of the Year Day and Waſt.

HEREOF we have treated at large, in the ſecond part of the Inſtitutes in his proper place upon the expoſition of Magna Carta, cap. 22. where it appeareth, that at this day the king ſhall have but the profits for a year and a day in lieu and ſatisfaction of the waſt which the common law gave to the king in deſpite and deteſtation of the offence, as there you may read at large: and there it appeareth how neceſſary it is, ancient authors to be read, all which need not here to be rehearſed: * and Mirror, cap. 1. §. 3. and cap. 4. §. *Et le roy in remembrance*, &c. Lege quia optime, Glanv. li. 7. cap. 17. Bracton, lib. 3. fo. 129. 137. Britton, c. 5. Regiſt. 165.

f. 14. Fleta, lib. 1. c. 28. § *Cauſa vero*, &c. 17 E. 2. Prær. Regis cap. ultimo. Mag. Cart. cap. 22. 3 E. 3. Cor. 356. 327. 310. 290. * 42 E. 3. ca. 1.

that if any ſtatute be made to the contrary of Magna Carta, it ſhall be holden for none. And therefore if *prærogativa regis anno* 17 E. 2. cap. *ultimo*, be contrary thereunto, it is repealed as to the waſt.

CAP. XLIX.

Of Piracy, Felonies, Robberies, Murders, and Confederacies committed in or upon the Sea, &c.

HAVING now treated of felonies, &c. that are committed and done upon the land, we will conſider of piracies, and felonies, &c. done on the ſea, which by an act of parliament are to be enquired of, heard, and determined according to the courſe of the common law, as if they had been done upon the land.

Rot. Parl. 8 H. 6. nu. 42.

28 H. 8. ca. 15.

All treaſons (2), felonies, robberies, murders and confederacies committed in or upon the ſea, or in any other haven, river, creek, or place, where the admirall hath, or pretends to have power, authority, or juriſdiction (3), ſhall be enquired, tried, heard, determined, and judged in ſuch ſhires, and places in the realm, as ſhall be limited by the kings commiſſion under the great ſeal in like form and condition, as if any ſuch offence had been committed upon the land (5), to be directed to the lord admirall, or to his lieutenant, deputy, or deputies, and to three or four ſuch other ſubſtantiall perſons, as ſhall be named by the lord chancellour of England (4), for the time being, &c.

Vid. 27 E. 3. c. 13. del ſtaple. 31 H. 6. cap. 4. Vide 2 R. 3. fo. 2. Vide Palaches caſe.

And ſuch as ſhall be convict of any ſuch offence by verdict, confeſſion, or proces by authority of any ſuch commiſſion, ſhall have and ſuffer ſuch pains of death, loſſes of lands, goods and chattels, as if they had been attainted of any treaſon, felony, robbery, or other the ſaid offences done upon the land.

See before in the chap. of Hereſy.

The offenders not to be admitted to have the benefit of clergy.

[112]

The miſchief before this ſtatute was (as it appeareth by the preamble) that traitors, pirates (1), thiefs, robbers, murderers, and confederators upon the ſea many times eſcaped unpuniſhed, becauſe the common law of this realm extended not to theſe offences, but were judged, and determined before the admirall, &c. after the courſe of the civill laws, the nature whereof is, that before any judgement of death be given againſt the offenders, either they muſt plainly confeſſe their offences (which they never will do without torture or pains),

See 40 Aſſ. pl. 25.

or

or by * witneſſe indifferent, ſuch as ſaw their offences committed, &c. which in theſe caſes cannot be gotten but by chance, or very rarely: for this cauſe, the commons petitioned in [a] parliament in 8 H. 6. that the juſtices of peace might enquire of all piracies: but the kings anſwer was, That he would be adviſed.

This ſtatute requires a conſiderate and juſt interpretation, wherein, for that it concerneth the life of man, the ſafeſt way is, to follow the reſolutions of all the judges formerly had upon due conſideration of all the parts of this act, and upon divers conferences, and in the end, when I was atturney generall, reſolved by them unanimouſly as followeth:

Where divers did in the reign of the late queen Elizabeth commit piracy and robbery upon the high ſea, of divers merchants of Venice, in amity with the ſaid queen, and after the pirats, being not known, obtained a pardon, granted at the coronation of king James, whereby the king pardoned them all felonies *(inter alia)* Firſt, that before this ſtatute piracy, or robbery on the high ſea was no felony, whereof the common law took any knowledge, for that it could not be tried, being out of all towns and counties, but was only puniſhable by the civill law, as by the preamble it appeareth; the attainder by which law wrought no forfeiture of lands, or corruption of bloud. Secondly, that this ſtatute did not alter the offence, or make the offence felony, but leaveth the offence as it was before this act, viz. felony only by the civil law, but giveth a mean of triall by the common law, and inflicteth ſuch pains of death, as if they had been attainted of any felony, &c. done upon the land. But yet (as hath been ſaid) the offence is not altered, for in the indictment upon this ſtatute, the offence muſt be alledged upon the ſea; ſo as this act inflicteth puniſhment for that, which is a felony by the civill law, and no felony, whereof the common law taketh knowledge. Thirdly, although the king may pardon this offence, yet being no felony in the eye of the law of the realm, but only by the civill law, the pardon of all felonies generally extendeth not to it, for this is a ſpeciall offence, and ought to be ſpecially mentioned.

Upon this reſolution theſe conſequents do follow. 1. That by the attainder upon this act, though there be forfeiture of lands, and goods, yet there is no corruption of blood. 2. Seeing the offence is not made felony by the laws of this realm, there can be no acceſſory of any felony by the laws of the realm in this caſe, either before or after the offence, becauſe the principall is no felon by our law, neither doth this act ſpeak of any acceſſory. 3. If there be an acceſſory upon the ſea to a piracy, that acceſſory may be puniſhed by the civill law before the lord admirall, but cannot be puniſhed by this act, becauſe it extendeth not to acceſſories, nor makes the offence felony. * Laſtly, the ſtatute of 35 H. 8. ca. 2. taketh not away this ſtatute for treaſons done upon the ſea for the cauſe aforeſaid. Which reſolution I have thought good to report, becauſe it openeth the windows of this ſtatute.

In Trin. 18 Eliz. in lord Diers manuſcript, there is a quære made, what offence it is to lodge and entertain upon the land a pirat, knowing him to be a pirat, and whether this acceſſory upon the land ſhall be tried by this ſtatute, which is only of principalls in piracy. And it was thought by the two chief juſtices, that the ſureſt way, was to have the commiſſion in the county where the

* Concerning treaſon, ſee before cap. 2. verb. *All trials.* fo. 25. 1 E. 6. ca. 12. 5 E. 6. ca. 11. &c.

[a] Rot. Par. 8 H. 6. nu. 42. Hil. 2. Ja. regis, at Serjeants Inne in Fleetſtreet, the reſolution of the juſtices.

Three points reſolved.

Vide ſimilia. 19 E. 3. Cor. 124. 8 H. 4. 2. 9 E. 4. 28.

* See the fourth part of the Inſtitutes, cap. High Treaſon. 5 El. cap. 5. Vide ſupra, cap. High Treaſon. Verbo *Ou per ailors*, f. 11.

acceſſory offended, and there both the principall and the acceſſory may be indicted, and tried, *ut per ſtatutum, anno* 5 & 6 E. 6. quære. *Hæc * ille.* So as this quære is now cleared by the reſolution of the judges: and queſtionleſſe the ſtatute (intended of 2 & 3 E. 6. for there is none ſuch in 5 & 6 E. 6.) extendeth only, when a murder or felony is committed in one countie, and another perſon is acceſſorie in another countie (as hath been ſaid before:) but in that caſe the offence was committed upon the ſea, and not in any countie, and ſo out of that ſtatute: and therefore this part of the manuſcript of the lord Dier was not thought fit to be printed.

2 & 3 E. 6. ca. 24...

Vid. lib. 2. fo. 93. Binghams caſe. See the lord Sancars caſe, lib. 9. 117, 118.

Anno 28 Eliz. Butle. & caſe.

Butler and other pirats in ſummer vacation robbed divers of her majeſties ſubjects, upon the coaſt of Northfolk, upon the high ſea; and brought divers of the goods ſo taken into the county of Northfolke, and there were apprehended with the goods: The queſtion moved to Wray chiefe juſtice, and juſtice Peryam, juſtices of aſſiſe in Northfolk, was, whether they might be indicted of felony in Northfolk, as if one ſteale goods in one county and carry them into another county, he may be indicted in either county? and it was reſolved by them, that they could not be indicted for felony in Northfolk; becauſe the originall taking was no felony, whereof the common law took conuſance, becauſe it was done upon the ſea, out of the reach of the common law: and therefore not like the caſe, where one ſtealeth in one county and carrieth the goods into another, for there the originall act was felony whereof the law took conuſance.

But now let us peruſe the words of the ſtatute.

(1) *Where traytors, pirats.*] This word pirat, in Latine *pirata*, is derived from the Greek word πειράτης, which againe is fetched from πειρᾶι, *à tranſcundo mare*, of roving upon the ſea: and therefore in Engliſh, a pirat is called a rover and a robber upon the ſea.

(2) *Treaſon, &c.*] Note, treaſon done out of the realme, is declared to be treaſon by the ſtatute of 25 E. 3. and yet at the making of this act of 28 H. 8. it wanted triall, (as by the preamble of this ſtatute it is rehearſed) at the common law. And therefore to eſtabliſh a certainty therein, the ſtatute of 35 H. 8. was made, as is aforeſaid in the expoſition of the ſtatute of 25 E. 3. See Paſch. 43 Eliz. lib. 5. fo. 107. Sir Henry Conſtables caſe.

25 E. 3. cap. 1. 40 Aſſ. p. 25.

Before the ſtatute of 25 E. 3. if a ſubject had committed piracie upon another (for ſo is the book to be intended upon a fact done before 25 E. 3.) this was holden to be petit treaſon, for which he was to be drawne and hanged: becauſe *pirata eſt hoſtis humani generis*, and it was *contra ligeanciæ ſuæ debitum*: but if an alien, as one of the Normans, who had revolted in the reigne of king John, had committed piracy upon a ſubject, this offence could be no treaſon, for though he were *hoſtis humani generis*, yet the crime was not *contra ligeanciæ ſuæ debitum*, becauſe the offender was no ſubject, but ſince the ſtatute of 25 E. 3. this is no treaſon in the caſe of a ſubject.

(3) *Upon the ſea, or in any other haven, river, creek, or other place, where the admirall hath, or pretends to have power, authority, or juriſdiction.*] Theſe words [or pretends to have, &c.] are thus to be underſtood, between the high-water-mark, and the low-water-mark; for though the land be *infra corpus comitatus*, at the reflow; yet

yet when the ſea is full, the admirall hath juriſdiction *ſuper aquam* as long as the ſea flowes: ſo as of one place there is *diviſum imperium* at ſeverall times: but extend not to any haven, river, creek, or other place, that is *infra corpus comitatus:* for offences there committed were triable by the common law, and out of the miſchiefe and purvien of this ſtatute: for in the preamble, the ſea is only mentioned, and in the body of the act it is ſaid, in like forme and condition, as if any ſuch offence had been committed upon the land.

8 E. 2. cor. 399. 46 E. 3. Conuſance 36. Stanf. pl. coron. 51. k. Regiſt. 129. 13 R. 2. ca. 5. 2 H 4. cap. 11. Pl. com. 37. 2 R. 3. fo. 12. 19 H. 6 7. 30 H. 6. 6. per Priſott. Forteſcue, ca. 34. 5 Eliz. cap. 18.

(4) *As ſhall be named by the lord chancellor of England.*] A nomination by the lord keeper of the great ſeale of England was taken to be * within this act by the greater opinion of the juſtices; but the ſtatute of 5 Eliz. hath made a declaration of the common law concerning the power and authority of the lord keeper of the great ſeale, which hath cleared that, and all other like queſtions.

*[114]

(5) *To heare and determine ſuch offences after the commun courſe of the lawes of this land uſed for treaſons, felonies, &c. done and committed upon the land.*] If the offender upon his arraignment before commiſſioners by force of this ſtatute ſtand mute, he ſhall have judgement *de peyne fort et dure*, by force of this generall branch, but it is out of the latter words of the act, viz. and ſuch as ſhall be convict of any ſuch offence by verdict, confeſſion, or proces. For he that ſtandeth mute is not convict of the offence, but ſuffereth for his contumacy. Alſo it is neither by verdict, confeſſion, or proces.

Trin. 7 Eliz. Dier 241. the caſe of Brook *alias* Cobham.

For *peine fort et dure:* ſee in the ſecond part of the Inſtitutes, in the expoſition upon the ſtatute of W. 1. cap. 12.

CAP. L.

OF CLERGIE.

Lib. 11. fo. 29, 30, &c. Alexander Poulters caſe. Lib. 5. 26, 27. in Caudries caſe. Vid. lib. 5. fo. 50. Biggens caſe, & fo. 110. Heſtons caſe. 18 Eliz. cap. 6.

WHAT perſon ſhall have his clergie, for what offences, in what ſuits, who is judge thereof, and at what time clergie is to be demanded, you may reade at large in Alexander Poulters caſe in the eleventh part of my reports: where alſo is reſolved the diverſity betweene a clerk convict, and a clerk attaint; what a clerk convict which hath his clergie ſhall forfeit, and at what time; and that none that hath his clergie allowed ought to make any purgation at this day; and that the king may pardon the burning of the hand, as well in an appeale, as upon an indictment.

[a] Lib. 4. fo. 43, 44 Syers caſe. ib. Bibiths caſe, 2 E. 3. 27. 22 E. 3. cor. 260. 7 H. 4. 16. 10 H. 4, 5. 3 H. 7. 1. 3 H. 7. cor. 53. 4 E. 6. Br. cor. 184. 3 Aſſ. 14. 5 Aſſ. 5. 11 H. 4. 93.

[a] If the principall hath his clergie before attainder, the acceſſory either before or after ought to be diſcharged.

[b] You may adde to the former report a record in rot. Clauſ. an. 3 E. 3. m. 2. & 18. That for ſacriledge the ordinary may allow clergie. So as it is in the election of the ordinary, either to allow or diſallow clergie in that caſe.

[b] Rot. cl. 3 E. 3. m. 2. 18.

[c] See a notable record Trin. 21 E. 3. coram rege, Rot. 173. Hertford, that *privilegium clericale non competit ſeditioſo equitanti cum armis platis, et cotearmuris, per leges Angliæ.*

[c] Tr. 21 E. 3. cor. rege, Rot. 173. Hertford.

[d] 25 H. 8. cap. 3. 32 H. 8 cap. 3. Vid. 1 E. 6. ca. 12. 5 E. 6. ca. 10.

[d] It is provided by the ſtatute of 25 H. 8. that if any perſon be indicted of felony for ſtealing of any goods or chattels in any county, and thereupon arraigned, and be found guilty, or ſtand mute, or challenge peremptory above the number of twenty perſons, &c. they ſhall loſe the benefit of their clergie, in like manner as they ſhould have done, if they had been indicted and arraigned, and found guilty in the ſame county, where the ſame robbery or burglary was done or committed, if it ſhall appear to the juſtices, &c. by evidence given before them, or by examination, that for ſuch robbery or burglary in the ſame ſhire where they were committed or done, they ſhould have loſt the benefit of their clergie by force of the ſaid ſtatute, viz. of 23 H. 8. cap. 1.

Any perſon indicted.] This act extendeth not to appeales by writ or bill, nor to the appeales of the approvors.

[e] Poulters caſe. Vbi ſupra fo. 31.

Or by examination.] [e] By theſe words though the offender confeſſe the indictment, or ſtand mute, or challenge above twenty, &c. yet if by examination before the juſtices, the truth of the caſe appeareth, he may be put from his clergie.

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By force of the ſaid ſtatute.] Viz. 23 H. 8. ſo as if for any burglary or robbery in one county he were not ouſted of his clergy by the ſtatute of 23 H. 8. but ſome later ſtatute, then the delinquent ſhall have his clergie in the county where the goods are carried: for example, if the robbery be done in a dwelling houſe, the owner or dweller, his wife, his children, or ſervants then being within the houſe, and put in feare and dread by the ſame, and the goods be carried into another county, he ſhall not have his clergy: but if the robbery in the dwelling houſe be not done with all the circumſtances mentioned in this act of 23 H. 8. (which circumſtances are not required by the ſtatute of 5 E. 6. cap. 9.) he ſhall not be ouſted of his clergie in the other county. And ſo of all like caſes.

Vid. Stanf. pl. cor. fo. 123, &c. De Clergie.

See 1 Jac. cap. 8. clergie taken from him which do ſtab another that hath not drawne a weapon, nor ſtricken firſt.

CAP. LI.

Of Abjuration and Sanctuary.

Cuſt. de Norm. cap. 24 & 8. Inter leges Inæ. cap. 5.

ABJURATION by the courſe of the common law may be thus deſcribed. When a man or a woman had committed felony, and the offender for ſafeguard of his or her life had fled to the ſanctuary of a church or churchyard, and there before the coroner of that place within forty dayes had confeſſed the felony, and took an oath for his or her perpetuall baniſhment out of the realm into a foraine countrey, chooſing rather *perdere patriam, quam vitam.* But that foraine countrey, into which he was to be exiled, muſt not be amongſt infidels. And this was the ancient law of this realme, which was, *prohibemus autem ne Chriſtiana fide tinctus quiſpiam à regno procul amandetur, neve ad eos qui nondum Chriſto fidem adjunxerunt relegetur, ne eorum aliquando fiat animorum jactura, quos propria Chriſtus vita redemit.*

Inter leges Canuti, fo. 105. ea. 3.

The foundation of the abjuration was the ſanctuary of the church or church-yard. For he or ſhe, that was not capable of this ſanctuary, could not have the benefit of abjuration. [a] And therefore it is ſaid, that he that committed ſacrilege, becauſe he could not take the priviledge of ſanctuary, could not abjure. For the forme of abjuration ſee the ſtatute of abjuration, Vet. Magna Carta, part 1. fol. 167. b. The [b] common law herein was very ancient, and had ſaved the life of many a man; and continued without change untill an act made in the twenty ſecond year of H. 8. cap. 14. whereby it was provided, that the party abjured ſhould not be baniſhed out of the realm, but to ſome other ſanctuary within this kingdom: [c] and to ſay the troth, abjuration was exceedingly intricated and perplexed by the ſaid act of 22 H. 8. cap. 14. and other ſtatutes: for which cauſes all ſtatutes made before the thirty fifth yeare of queen Elizabeth, concerning abjured perſons, ſtand repealed by the ſtatute of 1 Jac. cap. 25. whereby the ancient common law concerning abjuration for felony was revived.

[d] But by an act made in the twenty firſt year of king James it is enacted, that no ſanctuary or priviledge of ſanctuary ſhould be admitted or allowed in any caſe. By which act, ſuch abjuration as was at the common law, founded (as hath been ſaid) upon the priviledge of ſanctuary, is wholly taken away: and the writ in the Regiſter 69. a. *De reſtitutione extracti ab eccleſia* is become of no uſe.

[e] And yet the abjuration by force of the ſtatute of 35 Eliz. ca. 1. before juſtices * of peace, or juſtices of aſſize, or by force of an act made at the ſame parliament, cap. 2. before two juſtices of peace or the coroner by a recuſant, remaineth ſtill; becauſe ſuch abjuration hath no dependancie upon any ſanctuary. Which being ſufficient to ſhew how the law ſtandeth at this day, both concerning ſanctuary and abjuration, might ſuffice.

But yet he that is deſirous to reade the generall learning of abjuration the branch, and of ſanctuarie the root, let him reade the Mirror, ca. 1. §. 13. & cap. 5. §. 1. where he may reade the right uſe of abjuration by the ancient law of England. Et inter leges Edwardi, nu. 10. Cuſtum. de Normandie, cap. 24. Officium coronatorum, tit. Abjuration, Raſt. pl. 2. Bracton, li. 3. fo. 135. & 136. Britton, cap. Abjuration, fo. 24. & cap. Coroners, fo. 7. And Fleta, lib. 1. cap. 29. 8 E. 2. ubi ſupra. 3 E. 3. Coron. 313. 335. 21 E. 3. 17. 29 Aſſ. p. 34. Rot. Pat. 25 E. 3. part. 3. m. 16. Hil. 43 E. 3. Rot. 10. Coram Rege Buck. Hil. 26 E. 3. Coram Rege Rot. 20. *Quando aliquis abjuravit regnum, crux ei deliberat' fuit in manu ſua portanda in itinere ſuo per ſemitas ſuas, et vocatur vexillum ſanctæ eccleſiæ.* Rot. Parl. 2 R. 2. nu. 28. the right uſe of ſanctuary. 6 H. 4. 2. 8 H. 4. 2. 11 H. 4. 40. 7 H. 6. 8. 27 H. 6. 7. 2 E. 4. 17. 21. 9 E. 4. 29. 12 E. 4. 1, 2. 3 H. 7. Coron. Fitz. 54. 1 H. 7. 23. 25. 8 H. 8. Kelway. 188, 189. 190, 191. Fitz. Juſtice of Peace, fol. 202. Stanf. pl. cor. cap. Abjuration, fo. 116, 117, &c. *et ibidem* Sanctuary, cap. 38. Dier, 13 Eliz. fo. 296. lib. 5. fo. 12. 26. lib. 6. fo. 9. lib. Intrat. tit. Abjuration and Sanctuary.

[a] 8 E. 2. cor. 420.

[b] Sir Thomas Weyland Chiefe Juſtice of the Common Pleas, anno 17 E. 1. Vid. inter placita parl. an. 19 E. 1. apud Aſhring in Cro. Epiphaniæ.

[c] 50 E. 3. cap. Artic. Cleri, 9 E. 2. c. 10. 1 R. 2. cap. 9. 7 H. 7. cap. 7. 21 H. 8. cap. 2. 22 H. 8. ca. 14. 26 H. 8. ca. 13. 28 H. 8. cap. 1. 33 H. 8. cap. 15. 1 E. 6. cap. 12. 2 E. 6. ca. 2. & 33. 5 E. 6. cap. 10 13 Eliz. ca. 7. 1 Jac. ca. 25.

[d] 21 Jac. in the continuance of ſtatutes, &c.

[e] 35 El. ca. 1. & 2.

* [116]

CAP. LII.

De Hutesio et Clamore.

Of HUE and CRY.

THE one being an expreſſion of the other. For *huer* in French *(unde hutesium)* is to hoot or ſhoute; in Engliſh to crie.

There be two kindes of hues and cries, the one by the common law, and the other by ſtatute. Thereupon there are two purſuits, the one for the king, the other for the party by private ſuit.

Hue and cry by the common law, or for the king, is, when any felony is committed, or any perſon grievouſly and dangerouſly wounded, or any perſon aſſaulted and offered to be robbed either in the day or night; the party grieved, or any other may reſort to the [a] conſtable of the town, and acquaint him with the cauſes, deſcribing the party, and telling which way the offender is gone, and require him to raiſe hue and cry. And the duty of the conſtable is, to raiſe the power of the towne, [b] as well in the night as in the day, for the proſecution of the offender, and if he be not found there, to give the next conſtable warning, and he the next, untill the offender be found, and this was the law before the conqueſt. [c] *Si quis latroni obviam dederit eumque nullo edito clamore abire permiſerit, quanticunque fuerit latronis vita æſtimata extremum ſolvat denariolum, aut pleno, perfectoque jurejurando de facinore ſe nihil habuiſſe cogniti confirmato. Sin quis proclamantem exaudierit, neque vero fuerit inſequutus, ſuæ in regem contumaciæ (ni omnem criminis ſuſpicionem diluerit) pœnas dato.*

In antiquo M. S. ſi quis furi obviaverit, et ſine vociferatione gratis eum dimiſit, emendet ſecundum veram ipſius furis, vel plena lada ſe adlegiet, quòd cum eo falſum neſcivit: ſi quis audito clamore ſuperſedit, reddat overſameſſa regis aut plene ſe laidiet. Bracton who wrote before any act of parliament concerning hue and cry, ſaith, *omnes tammilites, quam alii qui ſunt 15 annorum † et amplius, jurare debent quòd utlagatos, murditores, robbatores, et burglatores non recipient, &c. Et ſi hutesium vel clamorem de talibus audiverint, ſtatim audito clamore ſequantur cum familia, &c.* and herewith agreeth Britton.

The ſtatute of W. 1. cap. 9. being in affirmance of the common law, provideth, *Que touts communement ſoient preſts a les ſomons des viſcounts, et ou crie de pais de ſuer et arreſter felons, quant miſter ſerra, auxibiens deins franchiſes come dehors.*

And the ſtatute of 4 E. 1. declareth the law *ſimiliter de omnibus homicidiis, burglar', occiſis, ſeu * periclitantibus levetur hutesium, &c. et omnes ſequantur hutesium, et veſtigium ſi fieri poteſt: et qui non fecerit, et ſuper hoc convictus fuerit, attachietur quòd ſit coram juſticiariis de gaola, &c.* And by that act it appeareth that ſo it is in caſe of rape, and therewith agreeth, [a] Bracton alſo.

The life of hue and cry is freſh ſuit.

[b] Thamar the daughter of king David being violently raviſhed by her brother Ammon, the text ſaith of her, *quæ aſpergens cinerem capiti*

[a] Rot. Parl. an. 6 E. 3. num. 6. Conſtable of the town to make hue and cry.
[b] 2 E. 4. 8. b. & 9. a.

[c] Inter leges Canuti, fo. 110. ca. 26. See inter leges Edw. Conf. ca. 21.

For Overſameſſa, See lib. Rub. c p. 36. Bracton, li. 3. fo. †[127]

Britton, fo. 15. & 19

Fleta, li. 1. c. 24.

See the 2. part of the Inſtitutes. W. 1. ca. 9. 4 E. 1. de officio coronatoris.

See the ſtatute of Winch. 13 Ed. 1.

* 7 E. 3. fo. 16. 22 Aſſ. 57. 38 E. 3. fo 6. aſſaulted to be robbed. 9 E. 4. 26. See the Cuſtum' of Norm. ca. 24.

[a] Bracton, li. 2. fo. 28 E. 3. ca. 11.

[b] 2 Regum, c. 13. verſ. 19.

capiti ſuo, ſciſſa talari tunica, impoſitiſque manibus ſuper caput ſuum ibat ingrediens, et clamans.

[c] They which levy not hue and cry, or purſue not upon hue and cry, ſhall be puniſhed by fine and impriſonment. [d] Alſo if a man be preſent when a man is murdred, or robbed, and doth not endeavour to attach the offender, nor levy hue and cry, he ſhall be fined and impriſoned.

[c] Bract. li. 3. fo. 118. b. Ca. Itin. m. c. 155. 3 E. 3. cor. 333.

[d] See 8 E. 2. cor. 395.

Of hue and cry by force of acts of parliament in five caſes. [e] Firſt, if a watchman doth arreſt a night walker, and he diſobey and fly, the watchman may make hue and cry.

[e] Stat. de Winc. watch. 4 H. 7. fo. 2. 18.

2. [f] *Si quis foreſtarius, parcarius, aut warrennarius in baliva ſua malefactores aliquos invenerit vagantes ad damnum ibidem faciend', et qui ſe foreſtariis aut warennariis illis poſt clamorem et huteſium levatum ad pacem regis ad ſtandum recte reddere noluerint, immo ad malitiam ſuam exequend' et continuand' et pacem regis diffugiend' fugam fecerit, et vi et armis ſe defenderint, licet foreſtarii, parcarii et warrennarii illi, aut alii quicunque ad pacem domini regis exiſtentes in comitativa foreſtariorum, parcariorum, aut warrennariorum illorum venientes ad tales malefactores ſic inventos arreſtand' ſeu capiend', aliquem ſeu aliquos hujuſmodi malefactorum interfecerint, non propter hoc occaſionentur coram domino rege, et juſticiariis quibuſcunque aut aliis balivis domini regis, aut aliorum quorumcunque infra libertatem aut extra: nec propter hoc amittant vitam, aut membrum, aut alium pœnam ſubeant, immo firmam pacem domini regis inde habeant. Sed bene caveant foreſtarii, parcarii, warrennarii, et alii quicunque, ne occaſione contentionis, diſcordiæ, contumeliæ, aut alicujus malevolentiæ, ſeu odii præhabit' aliquibus per balivas ſuas tranſeund' malitioſe imponant, quod occaſione malefaciendi in balivis ſuis intrant, cum hoc non fecerint, nec ipſos vagantes ut malefaciant, nec malefacientes invenerint, nec cauſam malefaciendi quærentes, et ſic eos occidant. Quod ſi fecerint, et de hoc fuerint convicti, fiat de morte ſic interfectorum, prout aliorum ad pacem domini regis exiſtentium, et prout de jure et ſecundum conſuetudinem regni fuerit faciend.*

[f] Statutum de anno 21 E. 1. Magna Cart. fo. 118. Foreſters.

3. Welſhmen outlawed, or indicted of treaſon or felony, that fly into Herefordſhire, ſhall be apprehended, &c. or elſe purſued by hue and cry, and a forfeiture upon thoſe that do not purſue.

23 H. 6. ca. 5. Vid. 17 H. 8. c. 26. Welſhmen.

4. Hue and cry ſhall be levied upon takers of carriage within the vierge of the ſtaple of that which pertaineth to the ſtaple.

27 E. 3. ca. 4. ſtaple.

5. Where a man is robbed: upon hue and cry, &c. what remedy he ſhall have againſt the hundred, &c. and how and in what manner the hue and cry ſhall be made in that caſe, ſee the ſtatutes, and lib. 7. fo. 6. & 7. the ſtatutes well expounded. And this robbery muſt be done in the day time, and not in the night, otherwiſe the party grieved ſhall not have his action. And ſo note a diverſity between a hue and cry at the common law, or for the king, and a hue and cry by ſtatute where the party grieved is to have his remedy by private action. Note alſo a diverſity in the proſecution at the common law, or for the king, and by the ſtatutes which give the party remedy, for a proſecution to the next conſtable is good by the common law, but ſo it is not by the ſaid ſtatutes which give the party grieved his action. See lib. 7. fo. 7. & 8. 22 El. Dier, 370. So the proſecution at the common law is a good excuſe upon an indictment at the kings ſuit, but note that it is no bar to the parties action.

Winch. 13 E. 1. 28 E. 3. c. 11. 27 El. c. 13. 38 El. ca. 25.

[118]

Lib. 7. fo. 7, 8. 22 El. Dier 370.

Where hue and cry either by the common law, or by force of any ſtatute is levied upon any perſon, the arreſt of ſuch perſon is lawfull,

29 E. 3. 9. 38 E. 3. 6. See 5 H. 7. 5. a. 21 H. 7. 28. a.

lawfull, although the cauſe of the hue and cry be feigned, and if the cauſe be feigned, he that levy the ſame ſhall alſo be arreſted, and ſhall be fined and impriſoned. But common fame and voice is not ſufficient to arreſt a man in caſe of felony, unleſſe a felony be done in deed.

Stat. de 18 E. 2. It is an article of the leet, to enquire of hues and cries levied and not purſued.

De civitate London capienda in manum regis pro hutefio non levato. Rot. Clauſ. 30 H. 3. m. 5. *Mandatum eſt Guilielmo de Haverhull theſaurario regis, quòd civitatem London capiat in manum regis, eo quòd cives ejuſdem civitatis non levaverunt hutefium et clamorem pro morte magiſtri Guidonis de Arretio et aliorum interfectorum ſecundum legem et conſuetudinem regni. Teſte rege apud Windeſlok 22 die Auguſti.*

CAP. LIII.

OF MAYHEM.

OF mayhem you may read at large in the [a] firſt part of the Inſtitutes ſect. 194. & 502. and in juſtice Stanford. And where (as it is there cited) he ſaith, *Caſtratio verò, quàm vis latens ſit, adjudicatur mahemium.* Hereof we find an example.

[b] *H. Hull indictatus fuit de mayhemio, eo quòd abſcidit virilia Johannis monachi, &c. quem idem H. deprehendit, &c. cum A. uxore ſua.* Of the like accident you may read in Camden.

[c] *Dominus Robertus Nevil (cum numeroſam prolem ex uxore ſuſcepiſſet) ignotus in adulterio deprehenſus, et ab adulteræ marito in vindictam genitalibus mutulatus, brevi vi doloris expiravit.*

Vide inter leges Alveredi. cap. 40 *de vulneribus, fo.* 43.

[d] By the ancient law of England, he that maimed any man, whereby he loſt any part of his body, the delinquent ſhould loſe the like part, as he that took away another mans life, ſhould loſe his own.

And it is truly ſaid, that *duellum eſt mahemium inceptum*, and *mahemium eſt homicidium inchoatum.* And therefore in the appeal or indictment it is ſaid *felonice mayhemavit.*

[a] Firſt part Inſtitutes §. 194. 502. Stanf. Pl. Cor. 38. b. Cuſt. de Norm. ca. 79. Mehaimus. Bracton, lib. 3. 144, 145. Fleta, li. 1. ca. 38.

[b] Rot. Clauſ. anno 13 H. 3. nu. 9. See before, ca. 13. for cutting out of tongues, &c.

[c] Camden Brit. page 593.

[d] Bract. lib. 3. fo. 148. nu. 4. Mirror, cap. 4. §. De pains in divers manners. Brit. fo. 48. b. Fleta, li. 1. ca. 38. Membrum pro membro. 18 E. 3. 20. a. Vide 28 E. 3. fo. 94. 8 H. 4. 20, 21. Coron. 458.

CAP,

CAP. LIV.

OF PREMUNIRE.

PRIMERMENT pur ceo que monſtre eſt a noſtre ſeignioiur le roy per grevouſes et clamouſes pleints des grandees et communes avant ditz, coment pluſors gents ſont, et ount eſtre treits hors de realme a reſponder des choſes dount la conuſans apperteint a la court noſtre ſeigniour le roy; et auxint que les judgements rendus in meſme le court ſont empeache en autre court, in prejudice et diſheriſon noſtre dit ſeigniour le roy et de ſa corone, et de tout le people de ſon dit realme, et in defeaſance et anientiſment de la common ley de meſme le realme uſe de touts temps. Sur quoy ewe bone deliberation ove les grandees et auters de dit councell, aſſentus eſt et accord per noſtre dit ſeigniour le roy, et les grandees et communes ſuiſditz. Que touts gents de la ligeance le roy, de quel conditione que ilz ſont, que trahent nulluy hors de realme (1) *en plea dont le conuſance appertient a la court le roy, ou des choſes dont judgement ſoit rendus* (2) *en le court le roy; ou que ſuent en autri court a defaire ou impeacher les judgements rendue in le court le roy* (3) *eient jour, &c.* (4) In Engliſh thus.

27 E. 3. cap. 1. The print being examined agreeth with the record. See the firſt part of the Inſtitutes, ſect. 199.

The ſtatute of 16 R. 2. cap. 5. ſaith, In curia Romana, vel alibi.

FIRST becauſe it is ſhewed to our lord the king by the grievous and clamorous complaints of the great men and commons aforeſaid, how that divers of the people be, and have been drawne out of the realme to anſwer of things, whereof the cogniſance pertaineth to the kings court: and alſo that the judgements given in the ſaid court be impeached in another court in prejudice and diſheriſon of our lord the king, and of his crowne, and of all the people of his ſaid realme; and to the undoing and deſtruction of the common law of the ſame realme at all times uſed. Whereupon, upon good deliberation had with the great men and other of his ſaid councell, it is aſſented and accorded by our lord the king, and the great men and commons aforeſaid, that all the people of the kings ligeance, of what condition that they be, which ſhall draw any out of the realme in plea, whereof the cogniſance pertaineth to the kings court, or of things whereof judgement is given in the kings court, or which doe ſue in any other court to defeat or impeach the judgements given in the kings court, ſhall have day, &c.

The effect of the ſtatute of 16 R. 2. is, if any purſue or cauſe to be purſued in the court of Rome, or elſewhere, any thing which toucheth the king, againſt him, his crowne and regality, or his

16 R. 2. cap. 5.

his realme, their notaries, procurators, &c. fautors, &c. ſhall be out of the kings protection.

Fourth part of the Inſtitutes, cap. 8. artic. 1. Die Decemb. anno 21 H. 8. againſt cardinall Woolſey. Vet. N. B. 143.

* In this act is declared the ſoveraignty, prerogative, and freedome of the crowne of England, and the firſt article exhibited by the lords of the councell, (whereof ſir Thomas More chancellor was one) and the principall judges concerning this matter, is worth your reading.

This offence is called a premunire of the words of the writ, grounded upon this and other ſtatutes for puniſhment thereof. For the words of the writ be, *Rex vicecomiti, &c. Præmunire fac.* A. B. &c. And rightly it is ſo called, for he that is *præmunitus* is *præmunitus.*

Before the making of this ſtatute of 27 E. 3. there were three great miſchiefs. Firſt, that the kings ſubiects have been drawn out of the realme, to the anſwer of things, whereof the conuſance pertained to the kings court. Secondly, of things whereof judgements have been given in the kings courts. And thirdly, that after judgements given in the kings courts of the common law, of matters determinable by the common law, ſuits were commenced in other courts within the realme, to defeat or impeach thoſe judgements. And theſe three miſchiefs had three unſufferable effects: firſt, the prejudice and diſheriſon of the king and of his crowne. Secondly, the diſheriſon of all his ſubjects. And thirdly, the undoing and deſtruction of the common law of this realm: all which appeare in the preamble of this act.

They are called (other courts,) either becauſe they proceed by the rules of other lawes, as by the canon or civill law, &c. or by other trials, then the common law doth warrant. For the triall warranted by the law of England for matters of fact, is by verdict of twelve men before the judges of the common law of matters pertaining to the common law; and not upon examination of witneſſes in any court of equity: ſo as *alia curia*, is either that which is governed *per aliam legem*, or which draweth the party *ad aliud examen.* For if the freehold and inheritances, goods, and chattels, debts, and duties, wherein the king or ſubject hath right or property by the common law, ſhould be judged *per aliam legem*, or be drawne *ad aliud examen*, the three miſchiefs aforeſaid expreſſed in the preamble and in this act ſhould follow, viz. diſheriſon of the king and of his crowne, the diſheriſon of all his people, and the undoing and deſtruction of the common law at all times uſed: by which words of this act it appeareth, that all theſe miſchiefs were againſt the ancient common lawes at all times uſed. And that alſo appeareth by the ancient writs of the common law, called *ad jura regia*, whereof ſome touch hath been given before, and which are worthy the reading: and alſo by divers acts of parliament; as the ſtatute of Carlile, *anno* 35 E. 1. whereof we have treated before in the ſecond part of the Inſtitutes: and by the ſtatute of 25 E. 3. *De proviſoribus.* And it is obſerved, that in 29 E. 3. within two yeares after the ſaid act of 27 E. 3. that they that were called in queſtion upon the ſtatute of premunire, *invenerunt manucaptores ſufficientes, et ſacramentum præſtiterunt, quòd non attemptabunt, citra mare vel ultra, quod in præjudicium regis, legum, ſeu coronæ, ſeu judiciorum in curia regis reddit', tendere valeat quoquo modo, &c.* Whereby, and many other like records it appeareth, that judgements

Regiſt. 61, 62, &c.

Mic. 29 E. 3. coram rege. Rot. 44. Cornub. V. 46 E. 3. 13, 14. Nota, citra mare.

judgements ought not to be queſtioned *citra mare*, in any court, unleſſe it be according to the courſe of the lawes of the realme.

By the ſtatute of 4 H. 4. cap. 23. it is ordained and ſtabliſhed, that after judgement given in the courts of our lord the king, the parties and their heirs ſhall be thereof in peace, untill the judgement be undone by attaint, or by error, if there be error, as hath been uſed by the lawes in the times of the kings progenitors. 4 H. 4. ca. 23.

[a] Alſo that which hath been ſaid appeareth by our books and ancient records, as hereafter ſhall appeare. [a] 10 H. 4. 1, 2. 18 H. 6. 6. b.

[b] 5 E. 4. fol. 6 where the ſtatute of 16 R. 2. cap. 5. ſaith, *In curia Romana vel alibi*, eccleſiaſticall courts within the realme are within this word [*alibi.*] [b] 5 E. 4. 6. b. 44 E. 3. 36.

[c] Mich. 11 H. 7. it was adjudged by the whole court, that a ſuit in the eccleſiaſticall court within the realme for a temporall cauſe, was in caſe of premunire. [c] 11 H. 7. Premunire. Fitz. 15 H. 7. 9. acc'. lib. Intr. Raſt. 468.

[d] A preſident of a premunire, for ſuing in the eccleſiaſticall court for a debt. [121] [d] Raſt. pl. 429.

[e] It was reſolved, that he that ſued in the eccleſiaſticall court for the forgery of a laſt will and teſtament, incurred the danger of a premunire, becauſe the party grieved might have his remedy by the common law. And in the ſame year of 17 H. 7. juſtice Spilman alſo reporteth, that one Turbervile, as well as for the king, as for himſelfe, did ſue a premunire againſt a perſon for ſuing for tithes in the eccleſiaſticall court, alledging the ſame to be ſevered from the nine parts, and judgement given againſt the defendant. [e] 17 H. 7. of the report of juſtice Spilman.

Alſo it appeareth that the admirals court is within this word [*alibi*] if he hold plea of any thing, which is not done *ſuper altum mare*, but *infra corpus comitatus*.

[f] Richard Beuchampe eſquire and Thomas Pauncefoot eſquire, and others, are charged with the offence of premunire, for that they ſued John Creſſey eſq; before Henry duke of Exeter admirall of England, for taking away a croſſe of gold and other goods, ſuppoſing the ſame to be taken *ſuper altum mare*, where in truth they were taken at Stratford in the county of Eſſex; where the ſtatute of 16 R. 2. is recited, that none ſhould ſue *in curia Romana ſeu alibi, &c.* and that the conuſance of this plea belonged to the common law, and not to the court of the admirall. And ſo it is of the conſtable and marſhall, if they hold plea of a matter determinable by the common law. [f] Mic. 38. H. 6. coram rege.

[g] Iſabel Winnington exhibited a bill of premunire againſt William Powdich upon the ſtatute of 16 R. 2. cap. 5. for ſuing in the admirall court before John earle of Huntington, admirall of England, for a cauſe which belonged to the common law, whereunto the defendant pleaded not guilty. [g] Mic. 9 H. 7. coram rege. Raſt. pl. 23. but this cauſe is entred. Trin. 9 H. 7. Rot. 37. coram rege.

And the reaſon of all theſe caſes is, becauſe they draw matters triable by the common law, *ad aliud examen*, and to be diſcuſſed *per aliam legem*.

But ſome have made a queſtion, whether ſince the eccleſiaſticall juriſdiction was acknowledged to be in the crowne, an eccleſiaſticall judge holding plea of a temporall matter belonging to the common law, doth incurre the danger of a premunire. Though hereof there is no queſtion at all, yet leſt any man might be led into an errour in a caſe ſo dangerous, we will clear this point by reaſon, preſident,

preſident, and authority. The reaſon holdeth ſtill to draw the matter *ad aliud examen, &c.* And the like queſtion might be made for the admirall court, which is, and ever was, the kings court, but governed *per aliam legem:* and ſo likewiſe of the court of the conſtable and marſhall.

At a convocation holden *anno* 22 H. 8. by a publick inſtrument made by all the biſhops and the whole clergie of England, the king was acknowledged to be ſupreame head of the church of England.

[h] 24 H. 8. tit. premunire, Brook 16.

[h] After this, viz. 24 H. 8. it appeareth that the ſtatute of premunire remained in force againſt eccleſiaſticall judges, for holding of pleas meerly determinable by the common law.

Hil. 25 H. 8. coram rege, Rot. Rich. Nick Biſhop of Norwich his caſe.

In 25 H. 8. Richard Nick biſhop of Norwich was attainted in a premunire at the kings ſuit, and his caſe was this. Within the towne of Thetford there then was a cuſtome, that all eccleſiaſticall cauſes ariſing within the ſaid towne ſhould be determined before the deane there, having a peculiar eccleſiaſticall juriſdiction, and that no inhabitant of the ſame town ſhould be drawn before any other eccleſiaſticall judge, and that every perſon ſuing contrary to that cuſtome, the ſame being preſented before the maior of Thetford, ſhould forfeit ſix ſhillings eight pence; and that an inhabitant of Thetford for an eccleſiaſtical cauſe riſing within Thetford, ſued another before the biſhop of Norwich within his conſiſtory court at Norwich: and this was preſented before the maior of Thetford according to the cuſtome, whereby he forfeited ſix ſhillings eight pence. The ſaid biſhop cited the ſaid maior for taking of the ſaid preſentment *pro ſalute animæ* to appear before him at his houſe at Hoxon in Suffolke, where the maior appeared, and there the biſhop *ore tenus* injoyned him, upon pain of excommunication to adnull the ſaid preſentment before a day. And for this offence he was attainted in a premunire upon his confeſſion before Fitz James chief juſtice, and the court of kings bench, upon the ſtatute of 16 R. 2. the record whereof we have ſeen. By which judgement two points are cleared: firſt, that the ſtatute of premunire extends to eccleſiaſticall courts within the realme. Secondly, that after the king was in poſſeſſion of his ſupremacy, the biſhops incurred the danger of premunire.

[122]

Trin. 36 H. 8. coram rege. Rot. 9. the B. of Bangors caſe. D. & St. lib. 2. ca. 24. fo. 106. b. Lib. 2. ca. 23.

The biſhop of Bangor was attainted in a premunire for holding plea of an advowſion, and of tithes ſevered from the nine parts.

Saint Germin in his book of Doctor and Student, who wrote after 26 H. 8, holdeth: that if a man maketh a promiſe for a temporall thing, and ſwear to perform it, and doth it not; if he be ſued for perjury in the ſpirituall court, a prohibition or a premunire lyeth in that caſe. Alſo he ſaith; if a man be excommunicate in the ſpirituall court for treſpaſſe, or ſuch other thing, as belongs to the kings crown and his royall dignity, &c. the party, if he will, may have a premunire fac. againſt him.

Br. tit. Premunire. 21. Temps. E. 6.

Brook reporteth, that Barloe biſhop of Bath and Wels, in the reign of king E. 6. deprived the dean of Wels, which deanry was a donative: and thereby incurred the danger of a premunire.

1 Eliz. cap.

By the ſtatute of 1 Eliz. (which reſtoreth the ancient juriſdiction eccleſiaſticall to the crown) the act of 1 & 2 Ph. and Mar. cap. 8. is repealed. But there is a ſpeciall proviſo in that act of 1 Eliz. that it ſhould not extend to repeale any clauſe, matter, or ſentence contained or ſpecified in the ſaid act of 1 & 2 Ph. and Mar. which doth

doth concerne matter of premunire, but that ſo much of that which concerneth any matter or cauſe of premunire, ſhould ſtand in force and effect. And that clauſe of the ſtatute of 1 and 2 Ph. and Mar. is this. That whoſoever ſhall by any proces obtained out of any eccleſiaſticall court, within the realme or without, by pretence of any ſpirituall juriſdiction, or otherwiſe, contrary to the lawes of the realme, inquiet or moleſt any perſon, &c. for any mannors, &c. parcell of the poſſeſſions of any religious houſe, &c. ſhall incurre the danger of the act of premunire, in *anno* 16 R. 2.

See the ſtatute of 25 H. 8. which alſo hath reference to the ſaid act of premunire, and is revived by 1 Eliz. 25 H. 8. ca. 20.

Thomas Stoughton parſon of N. in Suffolke, brought a writ of premunire againſt R. T. upon this ſtatute of 27 E. 3. for ſuing in the court of audience of the archbiſhop of Canterbury, to impeach a judgement given in a *quare impedit*, before the juſtices of aſſize in the county of Suffolk, &c. the defendant pleaded not guilty, &c. And this (omitting many other things for this matter) ſhall ſuffice. And now let us peruſe the body of the act. Trin. 29 Eliz. in communi banco Rot. 747. Tho. Stoughtons caſe

(1) *Trahe nulluy hors de realme.*] Of this there is no queſtion, being againſt the ancient law of the realme always in uſe; as by this act appeareth. And this was a remedie for the firſt miſchiefe.

(2) *Ou des choſes dont judgements fuer' rendus, &c.*] This branch prohibiteth all forain ſuits, viz. in the court of Rome, &c. for any thing whereof judgement was given in the kings court. And this was a remedie for the ſecond miſchiefe.

(3) *Ou que ſuent en autre court a defaire ou impeacher les judgements rendue in le court le roy.*] This is a remedy for the third miſchief. For having by the ſecond branch provided againſt forain ſuits to undoe, or impeach judgements in the kings court, this branch doth (as hath been ſaid) extend to all courts, which proceed by the rule of another law, or draw the party *ad aliud examen*, and therefore this branch doth extend to eccleſiaſticall courts, to the court of the conſtable, and marſhall, to the court of the admiralty, and to the court of equity proceeding in courſe of equity: for it had been to no effect to have provided againſt forain ſuits, which were troubleſome, tedious, and chargeable, and to have ſuffered the party to have attempted and proſecuted any thing at home within this realm, to the prejudice and diſheriſon of the king, and his crown, [123] and all his ſubjects, and to the ſubverſion of the common law. And firſt we will ſpeak of the court of equity. This court cannot proceed in courſe of equity after judgement at the common law, for three reaſons. Firſt, for that it draweth the matter triable, and determinable by the common law, *ad aliud examen*, viz. to a triall by witneſſes, which (as hath been ſaid) is contrary to the ancient law of the realm, and againſt the purvien of this ſtatute. Secondly, after judgment the parties ought to be at peace and quiet, for *judicia ſunt tanquam juris dicta*, and if the party againſt whom judgement is given, might after judgement given againſt him at the common law, goe into court of equity for matter in equity, there either ſhould be no end of ſuits, or every plaintif would leave the common law, and begin in the court of equity, whither in the end he muſt be brought, and that ſhould tend to the utter ſubverſion of the common law, as it is ſaid in the act. Thirdly, the court of equity in the proceeding in courſe of equity is no court of record, 37 H. 6. 14.

cord, and therefore it cannot hold plea of any thing, whereof judgement is given, which is a judiciall matter of record. And this is the ancient law at all times uſed, as this act ſpeaketh. As taking ſome few examples for many, both before, and after this ſtatute.

Anno 6 E. 1. the earl of Cornwals caſe. Lanceſton in Theſaur.

In the caſe of Edmond earl of Cornwall in *anno* 6 E. 1. it appeareth, that after judgement given before Roger Loveday and Walter Winborn juſtices of oier and terminer, againſt Walter biſhop of Exeter and his tenants, the ſaid biſhop procured the biſhop of Landaff in the pariſh churches of Cornwall and Devonſhire to pronounce ſentence of excommunication by the ſentence of the archbiſhop of Canterbury (which ſentence was had by the procurement of the ſaid biſhop of Exeter) againſt all perſons of what eſtate, degrees or dignity ſoever, that dealt in the proceedings, &c. againſt the ſaid biſhop and his tenants before the ſaid juſtices: and in this part of the record being in French, it is ſaid *La corone, et la dignity noſtre ſeigniour le roy ne doit per autre eſtre juſtice ne guyne, &c. Et les choſes que ſont paſſes en ſa court per judgement, ou en auter manner, ne devient eſtre en autri court recreces, &c.* Out of this record we may obſerve three things. Firſt, what the ancient law of this realm was, before the making of this act. Secondly, that [*en autri court*] which are the words of this act, was taken to be another court within the realm. Thirdly, that the miſchief before this act, was for ſuits in other courts within this realm, after judgements given in the kings courts. Read the whole record, which beginneth thus. *Cornub. dominus rex mandat, &c.*

Mich. 13 E. 3. In communi banco. Rot. 40. Inter Johannem de Dingle and Mich. de Englis Bedf.

And in 13 E. 3. there was a ſuit in the court of Rome after judgement in the kings court, and in that record it is ſaid, *In regi contemptum, et coronæ ſuæ præjudicium, ac judicii prædicti enervationē manifeſtam, &c. Ac quod judicia in curia regis rite reddita fruſtra redderentur, niſi debitum ſortirentur effectum.*

[a] Fleta who wrote before this ſtatute, ſaith, *Judicia debent rata permanere, et firma conſiſtere, uſque ad condignam ſatisfactionem inviolabiliter obſerventur.*

[a] Fleta li. 6. ca. 36. Trin. 19 E. 3. Rot. 50. Coram rege John Boltons caſe.

And as a maxime of the common law in the judiciall Regiſter, fo. 12. 35. 41, &c. it is often ſaid, *Ea quæ in curia domini regis rite acta ſunt, debitæ exccutioni demandari debent.*

Mich. 19 E. 3. Rot. 16 & Rot. 29. Alan de Coneſburghs caſe. F. N. B. 169. f. 20 E. 3. eſſoin. 24. 21 E. 3. 40. b.

Now let us ſee what hath been done ſince the act. [b] The ſtatute of 4 H. 4. cap. 23. hath been recited before, which is a judgement of parliament. [c] A judgement was obtained by covin and practice againſt all equity and conſcience in the kings bench: for the plaintif retained by colluſion an attorney for the defendant, (without the knowledge of the defendant, then being beyond ſea) the attorny confeſſeth the action, whereupon judgment was given; [d] the defendant ſought his remedy in parliament, and by authority of parliament power was given to the lord chancellor by adviſe of two of the judges to hear, and order the caſe according to equity, which proveth that the chancellour could not do it of himſelf without higher authority.

[b] 4 H. 4. ca. 23.
[c] Paſc. 5 E. 4. Coram rege inter Cobbe and Nore.
[d] Rot. Parl. ſimile. 3 H. 5. nu. 44. & 3 H. 6. nu. 22.

[e] No injunction after verdict at the common law is to be granted in chancery, and if the lord chancellor ſhould grant an injunction in that caſe the judges ſaid, that if the chancelor impriſoned the party

[e] 22 E. 4. 37.

party for breach of the injunction, they would grant an *habeas corpus* and deliver him.

Amongſt the articles preferred to the king by Sir Thomas Moore lord chancellor of England, and all the privy councel, and by Fitz James chief juſtice, and juſtice Fitz-Herbert againſt cardinall Woolſey, one is in theſe words, [And the ſaid lord cardinall hath examined divers and many matters in the chancery, after judgement thereof given at the common law, in ſubverſion of your laws, and made ſome perſons to reſtore again to the other party condemned that, that they had in execution by vertue of the judgement of the common law] which I have ſeen in parchment under all their hands, and is yet to be ſeen. 1 Decemb. 21 H. 8. Art. 20.

If judgements given in the kings courts ſhould be examined in chancery, before the kings councell, or any other place, the plaintif or demandant ſhould ſeldome come to the effect of their ſuit, nor the law ſhould never have end, &c. See the Diverſity of Courts ca. Chancery. Doct. and Stud. ca. 18. the book of Diverſity of Courts.

Ralph Heydon gent. was indicted of a premunire upon the ſtatute of 27 E. 3. for procuring of Sir Nicholas Bacon lord keeper of the great ſeal, to grant an injunction in chancery after judgement given in an *ejectione firme* of lands in Hertfordſhire. And the record ſaith, *Quod predictus Radus machinatus eſt antiquas legcs, et conſuetudines regni ſubvertere.* Mich. 8 & 9 El. in the kings bench.

A writ of premunire upon the ſaid ſtatute of 27 E. 3. by Richard Beans againſt Richard Lloyd, for ſuing before the preſident and councell in Wales, after judgement given in the court of common pleas, in an action of debt for forty and two pound ten ſhillings, *in ſubverſionem legum antiquarum, &c.* Trin. 21 El. in communi banco Rot. 319.

Peter Dewſe was indicted for procuring of Sir Thomas Bromly then lord chancelor, to grant an injunction in the chancery after a judgement given in an *ejectione firme.* Paſch. 27 El. in the kings bench.

John Heal of the Inner Temple London eſquire, was indicted of a premunire, for procuring a ſuit in chancery after a judgment given at the common law, contrary to the ſtatute of 27 E. 3. And the councell of Heal took two exceptions, one, that the court of chancery was not within the ſtatute of 27 E. 3. another, that one of the parties to the ſuit in chancery was named in one place by one name of baptiſme, and in another part of it by another. The court reſolved that the court of chancery was within the ſtatute of 27 E. 3. but found the other exception concerning miſnaming to be true. And therefore they quaſhed the indictment, but made a memorandum indorſed upon the back of the indictment, that it was overthrown for miſtaking a name, and not for the matter. Trin. 30. El. in the kings bench. Diverſity of Courts, ca. Chancery.

Thomas Throckmorton exhibited a bill in the chancery againſt Sir Moyl Finch after judgement given againſt him in the court of exchequer upon apparent matter of equity. Upon which bill the defendant demurred in law, and for that Sir Thomas Egerton then lord keeper inclined to rule over the demurrer, ſaying that he would not meddle with the judgement, but puniſh the corrupt conſcience of the defendant, in relieving the plaintif in equity: upon a petition to queen Eliz. (who ever favoured the due proceeding of her laws,) ſhe referred the conſideration of the demurrer to all the judges of England, who hearing councell learned on Mich. 39 & 40 El. See the fourth part of the Inſt. cap. Court of Chancery.

both parts, and upon view of presidents in the time of H. 8. and since of injunctions granted after judgements, and finding very few of them to warrant that which had been affirmed, and none of them to be done by the advice of any of the judges, they all after divers hearings, and conferences, and consideration had of the laws and statutes of the realm, unanimously resolved, that the lord keeper could not after judgement given relieve the party in equity, although it appeared to them, that there was apparant matter in equity. And amongst others, the judges gave this reason, that if the party against whom judgement was given, might after judgement given against him at the common law, draw the matter into the chancery, it would tend to the subversion of the common law, for that no [125] man would sue at the common law, but originally begin in chancery, seeing at the last he might be brought thither, after he had recovered by the common law, and thereupon they all certified, that the demurrer was good, and that Sir Moyl Finch the defendant ought not to answer.

Hil. 12. Ja. regis coram rege. An information upon this statute of 27 E. 3. against Sir Anthony Mildmay, for that he and other commissioners of sewers did impeach a judgement in the kings bench: he purchased a pardon from the king, and pleaded it.

See a privy seal bearing teste 18 Julii, anno domini 1616, to the contrary, obtained by the importunity of the then lord chancellor being vehemently affraid: *sed judicandum est legibus*, and no president can prevail against an act of parliament. And besides, the supposed presidents (which we have seen) are not authenticall, being most of them in torn papers, and the rest of no credit.

44 E. 3. 7. 36. 39 E. 3. 7. 7 E. 4. 2. 27 H. 6. 5. 36 H. 6. 30. * 43 E. 3. 6. 42 E. 3. 7. 2 R. 3. 17. 27 H. 6. 5. 22 H. 8. tit. Præm. Br. 1. Tr. 39 E. 3. Rot. 95. Coram rege. 39 E. 3. 37. 30 E. 3. 11. 44 E. 3. 36. Forebys case. a 8 H. 4. 6. Lib. 11. fo. 34. b. in Alex. Poulters case.

(4) *Eient jour contenant le space de 2 moys per garnishment a faire a eux, &c.*] By this it appeareth that a premunire lyeth as well for the party, as for the king, and they both may join in one writ.

* If the defendant come not at the day, &c. by the expresse letter of the law judgement shall be given against him according to this act. This suit need not be against them by originall writ, but if the defendant be *in custodia marescballi*, the suit may be against him by bill, because the end of the giving of the two months was, that they should have notice, which is satisfied, and therewith agreeth the presidents; and the defendant cannot be sued in any other court, when they are *in custodia marescballi*. See the statute of 18 El. cap. 5. but that statute extends to common informers, and not when the suit is commenced by the party grieved.

* But if the defendant appear and plead, and the issue be found against him, or if he demur in law, &c. judgement shall be given against him, that he shall be out of protection, &c. And so hath this statute been interpreted, and judgement given accordingly. Peruse well the words of this act for this point, and see the book in 8 H. 4. 6.

39 E. 3. 7. 9 E. 4. 2. 15 H. 7. 9. F. N. B. 26. m.

By the statute of 38 E. 3. cap. 2. the defendant ought to appear in person, and therefore he cannot appear by attorny without a speciall writ out of the chancery: and this act doth bind as well those that are lords of parliament as others.

27 H. 6. 5. 2 R. 3. 10.

Avant le roy et son councell.] Here councell cannot be taken, as most commonly it is, for his judges of his courts of justice, who are said to be of his councell for proceedings in courts of justice, because the courts of justice are hereafter in this act named: neither

ther doth it intend the kings privy councell, but the king, and the lords of parliament in parliament, which is a court of juſtice.

See the firſt part of the Inſtitutes, ſect. 164. *Veigne les burgeſſes al parlement.* There is *commune concilium, magnum concilium, privatum ſeu continuum concilium,* and *concilium juſticiariorum, le councel des juſtices.* The king is armed with divers councells.

Ils, lour procurators, attornies, executors, notaries, et mainteynors.] Note by this act the procurers, attornies, executors, notaries, and maintainers ſhall have the ſame puniſhment, that the principall ſhall have. Note in the ſtatute of 2 R. 2. this word (fautors) crept in, a word (derived *à favendo*) of a large extent, as it was conſtrued in the reign of H. 8.

The plaintif may chooſe whether he will make them all principals, or the one principall, and the other acceſſories, but the damages ſhall be ſeverally taxed. Stanf. pl. cor. 44. f. 44 E. 3. 7. 36 H. 6. 30. 42 E. 3. 7.

He that procures one to ſue to the court chriſtian, ſhall forfeit as much as he that ſueth, and is principall as well as the other, and are in equall degree of premunire: but if they both be indicted, the one of the act, and the other of the procurement, and he that is charged with the procurement is found guilty, and the other by an other enqueſt is found not guilty, judgement ſhall never be given againſt him, which was indicted of the procurement, becauſe he cannot be an offender, but in reſpect of the offence of the other. 8 R. 2. Prem. 12. 8 H. 4. 6. pl. com. 97. b.

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Hors de la protection le roy.] By theſe words the perſons attainted in a writ of premunire are diſabled to have any action or remedy by the kings law, or the kings writs; for the law and the kings writs are the things whereby a man is protected and aided, ſo as he that is out of the kings protection, is out of the aid and protection of the law. See Littleton ſect. 199. and the 1. part of the Inſtitutes the ſame ſect. Lib. 7. fo. 14. in Calvins caſe.

But by the ſtatute of 25 E. 3. it is provided, that he that purchaſeth proviſions to abbies, or priories ſhall be out of the kings protection, and that a man may do with him, as with the enemies of the king and his realm, and that he, that ſhall commit any thing againſt ſuch proviſors in body or goods, or other poſſeſſions, ſhall be excuſed againſt all people. 25 E. 3. ca. 2. See 5 El. ca. 1.

Et lour terres, biens, et chateux forfait au roy.] This is intended of the lands that he hath in fee-ſimple, or for life, which the delinquent might lawfully forfeit, and not lands in tail: for tenant in tail ſhall forfeit only for term of his life, for that was all he could lawfully forfeit at the making of this ſtatute, either in caſe of treaſon or felony. And ſo it was reſolved by the judges in the caſe of Trudgyn of Devonſhire, who was attainted of a premunire upon the ſtatute of 13 El. cap. 2. 34 H. 8. forfeit. Br. 101. Paſch. 21 El. reſolution of the judges in Trudgyns caſe. Dier, manuſcript. Vide before. 25 E. 3. Verb. Et ſoit aſſavoir.

Nota, this is a new kind of forfeiture given by this law, and is penall, and cannot by equity extend further then the records, and therefore this act extendeth not to the forfeiture of fairs, markets, rents charges, rent ſeck, warrens, annuities, or any other hereditament that is not within this word (*terre.*)

Lour corps impriſon, et rents al volunt le roy.] The greatneſſe of theſe puniſhments doe ſhew the greatneſſe of the offence.

It is to be obſerved, that the ſaid ſtatute of 16 R. 2. is ſtrictly penned 16 R. 2. ca. 5.

Examples of theſe are quoted before.

penned againſt offenders. For firſt it extendeth to all perſons of what quality, or ſex ſoever, the words be [if any]. 2. To all courts of what juriſdiction ſoever, and whether holden by right or wrong, *in curia Romana, ſeu alibi*, which word (*alibi*) is a word of a large extent, as before it appeareth. 3. To all things whatſoever. [Where any thing,] which words be as generall as can be. 4. Not only againſt the king, his crown and dignity, but againſt the kingdome alſo: againſt the king, his crown, and regalty, or realm. 5. This act extendeth not only to procurers, abetters, maintainers, counſellors, &c. which are known words in law, but to favourers, *fautores*, which word was largely extended in the reign of H. 8. whereby it is to be obſerved how dangerous it is to bring new or unuſuall words into any act of parliament, eſpecially into ſuch as be ſo penned: for there it appeareth that Cliff being a parſon of a church granted to the cardinall an annuity, ſo long as he ſhould be legate, *ut decentius et ſublimius ſe gereret in authoritate ſua legantina*, which the cardinall had by bull, and paid to him ten marks in name of ſeaſon, and he was adjudged a *fautor*. But ſuch evaſions were found out of this and other ſtatutes, as were made againſt uſurpations and incrochments upon the good and ancient common law, as divers and many ſtatutes were made from time to time to meet with ſuch evaſions, which being many, (and others which concern the offence of premunire) we will but name, and leave the reader to peruſe the ſame at large, wherein (as we conceive it) he ſhall find a great light, by that which hath been ſaid, viz. 25 E. 3. ca. 22. 25 E. 3. Statut. de proviſoribus. 38 E. 3. ca. 1, 2, 3, 4. 3 R. 2. cap. 3. 7 R. 2. ca. 12. 12 R. 2. ca. 15. 13 R. 2. Stat. 2. ca. 2. 16 R. 2. cap. 5. 2 H. 4. cap. 3. & 4. 6 H. 4. cap. 1. 7 H. 4. ca. 6. & 8. 9 H. 4. ca. 8. 3 H. 5. cap. 4. 24 H. 8. ca. 12. 25 H. 8. ca. 19, 20, 21. 26 H. 8. cap. 15. 28 H. 8. cap. 10. 35 H. 8. ca. 1. Note, queen Mary repealed all offences made to be in the caſe of premunire ſince the firſt day of the firſt year of H. 8. but ſome of them are revived by the ſtatute of 1 El. ca. 1. But in all queen Maries time, the ſtatutes made concerning the offences of premunire before the reign of H. 8. were neither repealed nor altered, but (as hath been ſaid) allowed of in queen Maries time. 1 & 2 Ph. and Mar. ca. 8. 1 El. ca. 1. 5 El. ca. 1. 13 El. cap. 1, 2. 8. 27 El. ca. 2. 21 Jac. ca. 3.

Vide juſtice Spilmans Report. Mich. 21. H. 8. Cliffs caſe.

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1 Mar. ca. 1.

And where the ſtatute of 25 E. 3. de proviſoribus provideth, that certain offenders againſt that act, ſhall before they be delivered, make full renunciation, &c. becauſe we deſire that our ſtudent may in all things underſtand what he reads: it is to be known, that as well before that ſtatute, viz. in the reigns of E. 1. and E. 2. as after, the form of renunciation was to this effect. I renounce all the words compriſed in the popes bull to me made of the biſhoprick of A. (or the like) the which be contrary, or prejudiciall to the king our ſoveraign lord, and to his crown, and of that I put my ſelf humbly in his grace, praying to have reſtitution of the temporalties of my ſaid church, &c. Whereby it may appear what the law was in that caſe before 25 E. 3. And albeit theſe laws be very ſevere, eſpecially againſt the buls, &c. of the pope, and forain juriſdiction, and though queen Mary reſtored his ſupremacy in ſuch ſort as hereafter appeareth, yet would ſhe not repeal the ſaid ſta-

Dier manuſcrip. Hil. 1 El. le caſe de Chriſtoforſon Eveſque de Chicheſter.

tutes

tutes of proviſion and premunire, but provided that they ſhould ſtand in force. See the ſtatute of 1 & 2 Ph. and Mar. whereby it is enacted, That whoſoever ſhould by any proces obtained out of any eccleſiaſticall court within this realm, or without, or by pretence of any ſpiritual juriſdiction, * or otherwiſe, contrary to the laws of this realm, inquiet, or moleſt any perſon, &c. ſhould incur the danger of the act of premunire made in the ſixteenth year of the reign of king R. 2. &c. And by another branch in the ſame act it is enacted, That all buls, diſpenſations, and privileges not containing matter contrary, or prejudiciall to the authority, dignity or preheminence royall of the realm, or to the laws of this realm now being in force, and not in this preſent parliament repealed, may be put in execution. And laſtly, by the ſame act, it is declared and enacted, That neither any thing contained in the body of the ſaid ſtatute, or in the preamble thereof, ſhall be conſtrued, or expounded to diminiſh, or take away any of the liberties, priviledges, prerogatives, preheminences, authorities or juriſdictions which were in the imperiall crown of this realm, or belonged to the ſame before the twentieth year of H. 8. and the popes holines to have ſuch authority, preheminence, and juriſdiction, as his holineſſe uſed, or might lawfully have uſed by authority of his ſupremacy the ſaid twentieth year of H. 8. within this realm of England, without diminution or enlargement of the ſame, and none other. Whereby it appeareth how carefull the ſtate was in queen Maries time to preſerve the prerogative of the crown, and the ancient laws of the realm, and did at that time ſo cautiouſly reſtore the ſupremacy of the pope, *ſecundum quid*, but not *ſimpliciter*, and bounded his ſupremacy within ſtrait and legall limitations, as by the ſaid act appeareth.

1 & 2 Ph. and Mar. ca. 8.

* Nota.

See the ſtatutes which inflict the puniſhment of premunire, viz. 2 R. 2. c. 12. 3 R. 2. ca. 3. 7 R. 2. ca. 12. 24 H. 8. ca. 12. 25 H. 8. ca. 19, 20. 1 El. cap. 1. 26 H. 8. cap. 15. 28 H. 8. ca. 16. 1 & 2 Ph. and Mar. cap. 1. 8 El. cap. 1. 5 El. ca. 1. 13 El. ca. 2. 8. 39 El. ca. 18. 27 El. ca. 2. See the fourth part of the Inſtitutes, cap. Chancery, the articles at large againſt Cardinall Woolſey, artic. 7.

We have been the longer concerning caſes of premunire. Firſt, for that they be matters of great weight, and neceſſary to be known, and we wiſh that the offence may never be committed. And ſecondly, for that maſter Stanford hath in effect but named a premunire.

Stan. pl. cor. 44. f.

CAP. LV.

OF PROPHESIES.

33 H. 8. cap. 14. 1 E. 6. cap. 12. Nota. 1 Mar. ſtat. unicum, Seſſione prima.

PPOPHESIES upon declaration of armes, fields, names, cogniſances, or badges, were made felony without the benefit of clergy: but this act is twice repealed by generall words of all felonies made by any ſtatute ſince the firſt year of H. 8.

5 Eliz. cap. 15. Mitius imperanti melius paretur. * Nota. The like act was made, 3 & 4 E. 6. ca. 15. expired.

In anno 5 Eliz. a more moderate ſtatute was made againſt propheſies by writing, ſinging, or other open ſpeech, or deed, by the occaſion of any armes, fields, beaſts, badges, or other like things accuſtomed in armes, cogniſances, or ſignets; or by reaſon of any time, year, or day, name, bloodſhed or warre, * to the intent thereby to make any rebellion, inſurrection, diſſention, loſſe of life, or other diſturbance within this realm, or other the queens dominions. For the firſt offence, impriſonment of his body by the ſpace of a year without baile, and forfeit to the queene and informer, ten pound. And for the ſecond offence impriſonment during life without baile, and forfeit to the queen all his goods and chattels, reall and perſonall: but he muſt be therefore impeached or accuſed within ſix moneths next enſuing the offence by him done. A juſt and neceſſary limitation, and the rather, for that the offence may be committed by bare words. This offence is to be heard and determined before juſtices of aſſiſe, juſtices of oier and terminer, and juſtices of peace.

See hereafter the chapter of Newes, and the ſecond part of the Inſtitutes, W. 1. cap. 33. He that hath read our hiſtories ſhall finde, what lamentable and fatal events have falne out upon vain propheſies carried out of the inventions of wicked men, pretended to be ancient, but newly framed to deceive true men: and withall, how credulous and inclinable our countreymen in former times to them have been, we will ſet down the truth concerning the ſame.

Auguſt. in lib. Retract.

Certaine it is, that to foretell of things to come, is a prerogative appropriated to the Holy Ghoſt; and that the devill cannot *prædicere*, foretell of things to come, which notwithſtanding, S. Auſtin did ſometime hold that he could. But afterwards juſtly retracted it in theſe words, *Rem dixi occultiſſimam audaciore affertione, quam debui, &c. certiſſimum eſt dæmones non præſcire.*

Now for the predictions and foretellings of the Sibyls being Gentiles, ſo long before the incarnation of our Saviour Chriſt; and more directly and particularly, of thoſe high myſteries of the incarnation and paſſion of Chriſt, the coming of Antichriſt, the ſubverſion of Rome, and the end of the world, they are by the true prophets of Almighty God, who ſpake by the Holy Ghoſt, well diſcovered; that while the church was in her cradle, theſe predictions were invented and fathered upon the Gentiles; to the intent to make the doctrine of the ſaid high myſteries of the goſpel the more credible amongſt the Gentiles. And if any ſuch predictions had been by the ſaid Sibyls, out of queſtion thoſe great lights of nature amongſt the Gentiles, Plato, Ariſtotle, Theophraſtus, or

ſome

ſome other of thoſe great philoſophers, that with great alacrity dived into the ſecrets of all kinds of learning, would have found them out, and made ſome mention of them. But beſides the ſaid [a] diſcovery, ſuch predictions by the Gentiles and heathen perſons are [b] againſt the word of God.

Alſo predictions either of the time or end of the world, or that it is at hand, is not lawfull. For the firſt, [c] ſee the firſt of the Acts, It is not for us to know the times and ſeaſons which the Father hath put in his own power, &c. For the ſecond, ſee the ſecond epiſtle to the Theſſalonians. I beſeech you brethren, &c. that you be not ſhaken in mind, or troubled, &c. as though the day of Chriſt were at hand, let no man deceive you by any means.

We have the rather ſaid hereof thus much, for that we have heard divers men boldly and confidently upon their numerall calculation to have erred herein.

[a] Caſaubone Exercit 1. ad apparatum Annalium, cap. 10.
[b] Epheſ. c. 3. v. 9. Col. cap. 1. v. 26. Rom. ca. 16. v. 25.

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[c] Acts ca. 1. v. 7. Mat. 24. 36. Mark 13. 32. 2 Theſſ. c. 2. v. 1, 2.

CAP. LVI.

OF APPROVER.

A PROVER, or approver, in Latin *probator*, is a perſon indicted of treaſon or felony in priſon for the ſame, and not diſabled to accuſe: he may [a] upon his arraignment, before any plea pleaded and before competent judges [b] confeſſe the indictment, and take a corporall oath to reveale all treaſons and felonies, that he knows, and pray a coroner, before whom he is to enter his appeale or accuſation againſt all thoſe that are *participes criminis*, or of his ſociety in committing of treaſon or felony contained in the indictment, thoſe partners being within the realme: and if upon his appeale [c] all thoſe partners be convicted, the king *ex merito juſtitiæ*, is to pardon him. But it is in the diſcretion of the court, either to ſuffer him to be an approver, or after his approvement to reſpite judgement and execution, untill he hath convicted all his partners.

A prover.] [d] He is by Bracton called *probator*, by Britton, *provor*, by the Mirror *provor* and *approver*: and his name putteth him in minde of his duty, viz, to prove and approve his accuſation or appeale in every point, for [e] any fayler of truth diſableth him *in omnibus*. And as he muſt affirme the truth, and the whole truth, before the coroner in his appeale: ſo in the rehearſall of the appeale before the juſtices, it muſt agree with the appeale, 26 Aſſ. p. 19. and Bracton *ubi ſupra*. [f] In one record I finde him called *appellator*.

Perſon.] This extendeth not to a peer or a lord of parliament, for it is againſt Magna Carta, cap. 29. for him to pray a coroner.

[g] A man attainted of treaſon or felony cannot become an approver, becauſe (as the book ſaith) he is *hors de la ley*. Alſo though he be indicted, yet if he be out of priſon, he cannot approve.

Parl. 28. E. 1. ca. Nota, for confronting.
[a] 9 H. 5. cor. 440. 21 E. 3. 18. 19 H. 6. 47. 2 H. 7. 3. 12 E. 4. 10. 3 H. 6. 50, 51.
[b] 1 H. 5. cor. 441. 3 H. 6. 50, 51. in bank le roy. Paſch. 2. H. 4. coram rege pl. 6.
[c] 21 H. 6. 29. b. & 34. b.
[d] Bract. lib. 3. fo. 122. b. & 152, &c. Britton. fo. 7. 11. 17. 48. Mir. cap. 1. § 13. cap. 3. exec. al provors, cap. 5.
[e] 25 E. 3. 42. 21 H. 6. 34. 22. E. 3. cor. 460. 26. Aſſ. p. 19.
[f] Paſch. 2 H. 4. coram rege. 6.
[g] 11 Aſſ. pl. 17. 21 E. 3. 18.

19 E 2. cor. 387. 19 E. 3. ibid. 443. 17 E. 3. 13.

h Mir. ca. 1. § 13. Stanf. pl. cor. 140. d.

h The Mirror ſaith, that women, infants, idiots, lepers, or profeſſors in order of religion, or clerks, or perſons attainted of felony, or *non compos mentis*, cannot be approvers: and Stanford added men above the age of 70, or maymed: becauſe ſome of them cannot take an oath, and none of them can wage battell.

i 40 Aſſ. 39. 15 E. 3. cor. 113. 11 H. 7. 5.

Indicted.] i For in any appeale either by writ or bill the defendant ſhall not become an approver: and before indictment, no perſon can approve, becauſe if his approvement be falſe, no judgement (whatſoever he confeſſed) can be given againſt him, unleſſe he be indicted, k and no judgement can be given againſt him if his appeale be falſe, but of the offence contained in the indictment, and ſo are the books to be underſtood.

k 25 E. 3. 39.

l 8 H. 5. cor. 442.

l If one be indicted and approve, if after an appeale be ſued againſt him, the approvement ceaſeth.

m 19 H. 6. 4. 12 E. 4. 10. 6 H. 6. cor. 131. 19 E. 2. cor. 387.

Of treaſon or felony.] And that is only of that treaſon or felony that is contained in the indictment, as hath bin ſaid. m See Trin. 3 H. 4. Rot. 19. coram rege Hertford. *Probator in duello devicit appellat', de alta proditione, * pro quo devictus ſuſpenditur, decapitatur, et quarteria ſua dividuntur, et ſimile ibid. Anglia.*

* [130]

a 6 H. 6. ubi ſup. 21 E. 3. fo. 18. V. 3 H. 6. 51, 52.

In priſon.] a Albeit he be indicted, yet if he be at large, and not in priſon, he cannot approve as before is ſaid.

b Bract. ubi ſup. 9 H. 4. 1. 2 H. 4. 19. 44 E. 3. 44. Lib. 10. fo. 76. b.

Competent judge.] b As juſtices of the kings bench, juſtices of oier and terminer, and of gaole delivery, but not juſtices of peace, becauſe they have no authority by their commiſſion to aſſigne a coroner. And by the ſame reaſon the lord high ſteward of England cannot aſſigne a coroner in caſe of treaſon or felony.

12 E. 4. 10. 21 H. 6. 34, 35.

Corporall oath.] Though the oath be generall of all treaſons and felonies, yet in courſe of law no approvement can be, but of the offence contained in the indictment as hath been ſaid. And this oath and the accuſation of himſelf make his appeale or accuſation of another of the ſame crime, to amount in law to an indictment.

40 Aſſ. 39. 10 E. 4. 14.

Particeps criminis.] For it cannot be of another treaſon or felony then is contained in the indictment,

1 E. 3. 17. 1 Aſſ. p. 2.

Within the realme.] For if it be out of the realme, it wanteth triall, and therefore the accuſation or appeale not to be allowed.

26 Aſſ. 13. 8 H. 5 cor. 459. 21 H. 6. 34. 12 E. 4. 10.

Ex merito juſtitiæ.] And the reaſon is, for that he riddeth the countrey of wicked and hurtfull miſdoers: whereby the kings peace is kept, and the ſubject enjoyeth his own quiet. And therefore the king doth in the meane time give him wages.

Mich. 39 E. 3. coram rege Rot. 97. Suff.

A man became an approver and appealed five, and every of them joyned battell with him. *Et duellum percuſſum fuit cum omnibus, et probator devicit omnes quinque in duello, quorū quatuor ſuſpendebantur, et quintus clamabat eſſe clericum, et allocatur; et probator perdonatur:* ſo as the approver did and ought to fight in that caſe with all the appellees. But if there be two or more approvers againſt one man of one felony, and he joyne battell with them all, and vanquiſh the firſt, he is acquited againſt the other. Concerning the proces upon an approvement and other incidents, you may reade in Mr. juſtice Stanford, which need not here to be rehearſed.

7 E. 3. 7. 11 H. 4. 91. b. Of battell ſee more here, cap. Single combat, and the ſecond part of the Inſtitutes, Weſtm. 1. cap. 40.

* 47 E. 3. 5.

* If the appellee joyne battell, or plead not guilty, and after the

the king pardoneth the approver, the appellee ſhall be diſcharged, and ſhall not be arraigned at the ſuit of the king.

Convicted.] The appellee may chooſe either to wage battell with the approver, or to put himſelf upon the countrey; and if the appellee be found guilty by verdict, it ſerveth as well for the approver, as if he had been overcome by battell. And therefore the book in 19 H. 6. 35. is miſprinted, or miſreported: and the note of Fitzh. in abridging the caſe, tit. Coron. pl. 6. in the end, is againſt law. *Vid.* Rot. Parl. 17 E. 3. nu. 36.

Stanf. pl. cor. 142.

19 H. 6. 35. a. Rot. Parl. 17 E. 3. nu. 36.

CAP. LVII. [131]

OF APPEALS.

OF appeals we have ſpoken in the firſt and ſecond parts of the Inſtitutes, and you may reade thereof in my reports, lib. 4. fo. 40, 41, 42, &c. lib. 5. fo. 105. 111. lib. 6. fo. 44. 80. lib. 7. fo. 13. 30. lib. 9. fo. 13. 119. Whereunto we will adde a [b] caſe which was adjudged in an appeal, where the caſe, as touching the point of the appeal, was thus. Thomas Burghe, brother and heire of Henry Burghe brought an appeale of murder againſt Thomas Holcroft, of the death of the ſaid Henry: the defendant pleaded, that before the coroner he was indicted of manſlaughter, and before commiſſioners of oier and terminer, he was upon that indictment arraigned, and confeſſed the indictment, and prayed his clergie, and thereupon was entred *curia adviſare vult*, and concluded, and demanded judgement, if that appeal the plaintife againſt him ought to maintain: whereupon the plaintife demurred in law. And in this caſe three points were adjudged by ſir Chriſtopher Wray, ſir Thomas Gawdie and the whole court.

Firſt part of the Inſtitutes. § 189, 500, 501. Second part of the Inſtitutes, in Mag. Cart. ca. 34. W. 1. ca. 14. fo. 460. Cuſt. de Norm. cap. 68.

[b] Paſch. 20 Eliz. in the k. bench. Tho. Holcrofts caſe, and after, viz. Mich. 33. & 34 Eliz. between Kath. Wrote, late the wife of Rob. Wrote, pl. in an appeale againſt Tho. Wiggs def. coram rege, for the death of her huſband, reſolved againe accordingly.

Firſt, that the matter of the barre had been a good barre of the appeale by the common law, as well as if the clergie had been allowed: for that the defendant upon his confeſſion of the indictment had prayed his clergy, which the court ought to have granted, and the deferring of the court to be adviſed, ought not to prejudice the party defendant, albeit the appeale was commenced before the allowance of it.

The ſecond point adjudged was, that this caſe was out of the ſtatute of 3 H. 7. for that the words of that act are.

If it fortune that the ſame felons and murderers, and acceſſories ſo arraigned, or any of them to be acquited, or the principall of the ſaid felony, or any of them to be attainted, the wife or next heire of him ſo ſlaine, &c. may have their appeal of the ſame death and murder againſt the perſons ſo acquited, or againſt the ſaid principals ſo attainted, if they be alive, and that the benefit of his clergie thereof before be not had.

3 H. 7. cap. 1.

And

And in this caſe the defendant Holcroft, was neither acquited nor attainted, but convicted by confeſſion, and the benefit of clergy prayed, as is aforeſaid. So as the ſtatute being penall concerning the life of man, and made in reſtraint of the common law, was not to be taken by equity, but is *caſus omiſſus*, and left to the common law.

As to the third it was objected, that every plea ought to have an apt concluſion, and that the concluſion in this caſe ought to have beene, *Et petit judicium ſi prædict. Thomas Holcroft iterum de eadem morte, de qua ſemel convictus fuit, reſpondere compelli debeat.* But it was adjudged that either of both concluſions was ſufficient in law: and therefore that exception was diſallowed by the rule of the court.

11 H. 4. 11. Pl. com. 306. b.

Nota, the ancient law was, that when a man had judgement to be hanged in an appeal of death, that the wife, and all the blood of the party ſlaine ſhould draw the defendant to execution, and Gaſcoigne ſaid, *Iſſint fuit in diebus noſtris.*

Trin. 10 E. 1. in Banco, Rot. 30. Norff.

Richardus de Crek appellat quinque pro felonia, et offert diſrationicinare per corpus ſuum contra quemlibet eorum ſeparatim. Ipſi petunt ſe allocari, quod ubi appellans dicit in appello ſuo, quod ipſi fregerunt oſtium Bracini, et non ſpecificat ex parte domus illius prædictum oſtium ſcitum fuit, et petunt judicium. Et Joh. Wanton unus defendent' defendit feloniam, et totum, et paratus eſt defendere per corpus ſuum ſicut curia conſideraverit. Ricus dicit quòd non poteſt pugnare contra prædictum Johannem eo quod ipſe mahematus eſt in humero ſuo dextro. Et prædictus Johannes petit judicium deficut prædictus Ricus appellando ipſum optulit diſrationare prædictum Robertum verſus ipſum tanquam felonem prout cur' conſider' per corpus ſuum, et nullam fecit mentionem de aliquo mahemio, unde petit judicium de appello iſto. Et ideo conſiderat' eſt tam ad calumpniam prædicti Henr. et aliorum, quàm prædicti Johannis, quòd appellum ejus nullum. Set pro rege inquiratur rei veritas, &c.

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Nota how the concluſion of the appeal of felony ought to be when the plaintif is mayhemed and cannot make tryall by battail.

* There lay an appeal of high treaſon by the common law either in parliament before the ſtatute of 1 H. 4. ca. 14. or in ſuch of the kings courts as have juriſdiction thereof triable by battail or verdict: and this appeareth by all our ancient authors, and divers records, and ſee in Bracton, fo. 119. a. What pleas the defendant in the appeal of treaſon may have, to diſable the plaintif to maintain his appeal, ſee Fleta ubi ſupra, and Britton ubi ſupra.

* See before c. 1. high treaſon, fo. 6. 1 H. 4. ca. 14. Glanv. li. 14. c. 1. Bracton, lib. 3. fo. 118, 119. Britton cap. 16 Mich. 4 H. fol. 122.

8 & 29. Fleta lib. 1. ca. 21. The Mirror cap. 2. § 11. Pat. 25 E. 3. part. 1. m. 4. coram rege Rot. 22. &c. 8 H. 6. ca. 10. F. N. B. 115. Lib. Intrat. Raſt.

CAP.

CAP. LVIII.

OF TREASURE TROVE.

Theſaurus inventus.

TREASURE trove is when any gold or ſilver, in coin, plate, or bullyon hath been of ancient time hidden, whereſoever it be found, whereof no perſon can prove any property, it doth belong to the king, or to ſome lord or other by the kings grant, or preſcription. Cuſtum. de Nor. ca. 18.

The reaſon wherefore it belongeth to the king, is a rule of the common law; that ſuch goods whereof no perſon can claim property belong to the king, as wrecks, ſtrays, &c. *Quod non capit Chriſtus, capit fiſcus.* It is anciently called * *fynderinga*, of finding the treaſure. And now let us peruſe this deſcription. * Inter leges H. 1. ca. 11.

Gold or ſilver.] For if it be of any other metall, it is no treaſure; and if it be no treaſure, it belongs not to the king, for it muſt be treaſure trove. Pl. Com. in caſe de Mines per totum.

It is to be obſerved, that veyns of gold and ſilver in the grounds of ſubjects belong to the king by his prerogative, for they are royall mines, but not of any other metall whatſoever in ſubjects grounds. Vid. Bract. li. 2. fo. 222. Auri fodina, et argenti fodina.

Whereſoever.] [a] Whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a caſtle, [b] houſe, building, ruines, or elſewhere, ſo as the owner cannot be known. Fleta, lib. 4. ca. 19. Rot. Parl. 3 R. 2. nu. 42. 27 Aſſ. p. 19.

Whereof no perſon can prove any property.] For it is a certain rule, [c] *Quod theſaurus non competit regi, niſi quando nemo ſcit qui abſcondit theſaurum.* [a] Bract. l. 1. fo. 10. li. 3. 120. Britton, fo. 3. b. 7. b. 26. b. 71. b. Mir. ca. 1. § 3. & § 13. ca. 3. §. iſto. Glanv. l. 1. ca. 1. li. 14. ca. 2.

Of ancient time hidden.] [d] *Eſt autem theſaurus vetus depoſitio pecuniæ, &c. cujus non extat modo memoria, adeo ut jam dominum non habeat.*

Belong to the king.] [e] Where of ancient time it belonged to the finder, * as by the ſaid ancient authors it appeareth. And yet I find that before the conqueſt, *Theſauri de terra domini regis ſunt, niſi in eccleſia, vel cœmeterio inveniantur; et licet ibi inveniatur aurū, regis eſt, et medietas argenti eſt medietas eccleſiæ, ubi inventum fuerit, quæcunque ipſa fuerit, vel dives, vel pauper.* *[133]

By the kings grant or preſcription.] 21 H. 6. tit. Preſcription. 4. 22 E. 3. cor. 241. 1 H. 7. 33. 9 H. 7. 20. 46 E. 3. 16. Stanf. pl. cor. 39. b. lib. 5. fo. 109. b. [b] In bundell inquiſit. 32 E. 3. in Abbathia Sanctæ Mariæ Eborum. Bract. ubi ſupra. Non refert in quo loco hujuſmodi theſaurus inveniatur.

The puniſhment of him that concealeth, &c. it.] It appeareth by Glanvill, and Bracton alſo, that *occultatio theſauri inventi fraudulosa* was ſuch an offence, as was puniſhed by death. But it hath been reſolved, that the puniſhment for concealment of treaſure trove, is by fine and impriſonment, and not * of life and member. [c] 22 H. 6. Cor. 446. [d] Bract. ubi ſupra, and the other ancient E. 3. ibid. 241.

authors agree thereunto. [e] Glanv. li. 1. c. 1. li. 14. ca. 2. 8 E. 2. Cor. 436. 22 Glanvil, ubi ſup. Bracton and the other authors ubi ſupra. * 22 Aſſ. p. 99.

To

The ancient authors ubi ſupra, agree hereunto.

To whom the charge thereof belongeth.] It belongeth to the coroner, as appeareth by the ſtatute *de officio coronatoris*, *anno* 4 E. 1.

CAP. LIX.

OF WRECK.

SEE the ſecond part of the Inſtitutes W. 1. cap. 2. and the expoſition upon the ſame.

CAP. LX.

Of Falſe Tokens, or Letters in other Mens Names.

33 H. 8. ca. 1.

IF any perſon falſly and deceitfully obtain into his hands any moneys, goods, chattels, jewels, or other things of any perſon or perſons, by colour or means of any falſe or privy tokens, or counterfeit letters made in any other mans name, &c. he ſhall ſuffer ſuch correction by puniſhment of his body, ſetting upon the pillory, or other corporall pain (except pains of death) as ſhall be to him adjudged by the perſon and perſons before whom he ſhall be convicted, with a ſaving to the party grieved by ſuch deceit, ſuch remedy by way of action, or otherwiſe, as he might have had by the common law.

Here it is to obſerved, that upon this ſtatute, for this offence the offender cannot be fined, but corporall pain only inflicted.

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CAP. LXI.

OF THEFTBOTE.

Stat. Wall. anno 12 E. 1. Vet. Mag. Cart. pt. 2. fo. 6.

THEFTBOTE (deſcribed by act of parliament) *eſt emenda furti capta ſine conſideratione curiæ domini regis*: and ſo much the word ſignifieth, *bote* being taken for amends: *theftbote*, that is, amends for theft.

See Rot. Claus. an. 1 E. 1. m. 7. 42 Aſſ. p. 5.

This offence is more then miſpriſion of felony, for that is not a concealment of his bare knowledge only; but theftbote is when the owner

owner not only knowes of the felony, but taketh or the thief his goods again, or amends for the ſame to favour or maintain him, that is, not to proſecute him, to the intent he may eſcape: but in that caſe, if he receive the thief himſelf, and aid and maintain him in his felony, then is he acceſſory to the felony. And ſo note a diverſity, *quando proprietarius recipit latrocinium, et quando latronem*, But if a man take his goods again that were ſtollen, it is no offence, unleſſe he favour the thief, as is aforeſaid.

Mir. ca. 2. § 12. 3 E. 3. Cor. 353. Stanf. pl. coron. 40. b. 42 Aſſ. ubi ſupra.

The puniſhment of theftbote is ranſome and impriſonment: and ſeeing the puniſhment of theftbote, which is greater then concealment of felony, is but ranſome and impriſonment, it ſtandeth with reaſon, that the puniſhment of * miſpriſion of felony ſhould be but fine and impriſonment. Theftbote is ſometimes taken *pro ipſo latrocinio*, for the thing itſelf ſtollen from you.

3 E. 3. Cor. 353.

* See before in the chapter of Miſpriſion of Treaſon, ca. 3. Mir. ca. 1. §. 17. Britton, fo. 33.

You ſhall read in ancient authors of redoubbors, addoubors, derived of the French word *addoubeur*, they are in law patchers, botchers, or menders of apparell, that take * theftbote of cloth (and change it into another faſhion) and are dwelling out of burghs and cities; becauſe in thoſe days burghs and cities were ſo well governed, as ſuch offenders were ſoon diſcoverd: for they were not then commended, for that they were populous, but for that the governors were provident in preventing of offences.

* That is, ſtoln cloth.

CAP. LXII.

OF INDICTMENTS.

CONCERNING Indictments we have ſpoken ſomewhat in the firſt part of the Inſtitutes. Sect. 194. 208. And you may read in my Reports many reſolutions concerning indictments, viz. lib. 4. fo. 40, 41, 42. &c. lib. 5. fo. 120, 121, 122, 123. li. 7. fo. 5, 6. 10. li. 8. fo. 57. 36, 37. li. 9. fo. 62, 63. 116. 118.

See the 1 pt. of the Inſtitutes, ſect. 194, 195.

We will add one point adjudged in the caſe between Burgh and Holcroft before mentioned in the chapter of Appeals, which was, that where it is provided by the ſtatute *de Artic ſuper Cartas*, cap. 3. *En caſe de mort del home (deins le verge) ou office del coroner appent as viewes, et enqueſts de ceo faire, ſoit maunde al coroner del pais que emſemblement ove le coroner del hoſtel le roy face loffice que appent*, &c. And in that caſe one man was coroner both of the kings houſe, and of the county, and the indictment of manſlaughter was taken before him as coroner both of the kings houſe, and of the county. And it was adjudged that the indictment was good, becauſe the miſchief expreſſed in the ſtatute was remedied, as well when both offices was in one perſon, as when they were in divers: and therefore in this caſe the rule did hold, *Quando duo jura concurrunt in una perſona, æquum eſt, ac ſi eſſet in diverſis.*

Holcrofts caſe. Artic. ſuper Cart. ca. 10. The ſame was again reſolved in Wrots caſe, ubi ſupra.

Richard Weſton, yeoman, late ſervant of Sir Gervaſe Elwys, lieutenant of the Tower, and under the lieutenant, keeper of Sir Thomas Overbury then priſoner in the Tower, was indicted: for that he the ſaid Richard the 9 day of May *an.* 11. *Ja. regis*, in the

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Sir Tho. Overburies caſe. Mich. 13 Jac. See before, ca. 7. Of murder more of this caſe.

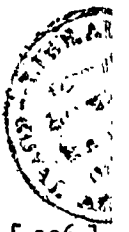
the Tower of London, gave to the ſaid Sir Tho. Overbury poyſon called roſeacre in broth, which he the ſaid Sir Thomas received. *Et ut idē Rich. Weſton præfatum Tho. Overbury magis celeriter interficeret et murdraret, 1 Junii anno 11 Ja. regis ſupradict.* gave to him another poyſon called white arſenick, &c. and that 10 *Julii an.* 11. *ſuprad.* gave to him a poyſon called mercury ſublimat' in tarts, *ut prædict' Tho. Overbury magis celeriter interficeret et murdraret:* and that a perſon unknown in the preſence of the ſaid Richard Weſton, and by his commandment and procurement, the 14 of Septemb. *anno* 11. *ſupradict.* gave to the ſaid Sir Thomas a glyſter mixt with poyſon called mercury ſublimat, *ut prædictum Thomam magis celeriter interficeret et murdraret. Et prædictus Thomas Overbury de ſeperalibus venenis prædictis et operationibus inde, à prædictis ſeperalibus temporibus, &c. graviter languebat uſque ad* 15 *diem Septemb. anno* 11. *ſupradicto, quo die dictus Thomas de prædictis ſeperalibus venenis obiit venenatus, &c.* And albeit it did not appear of which of the ſaid poyſons he died, yet it was reſolved by all the judges of the kings bench, that the indictment was good; for the ſubſtance of the indictment was, whether he was poyſoned or no. And upon the evidence it appeared, that Weſton within the time aforeſaid had given unto Sir Thomas Overbury divers other poyſons, as namely the powder of diamonds, cantharides, lapis cauſticus, and powder of ſpiders, and aqua fortis in a glyſter. And it was reſolved by all the ſaid judges, that albeit theſe ſaid poyſons were not contained in the indictment, yet the evidence of giving them was ſufficient to maintain the indictment: for the ſubſtance of the indictment was (as before is ſaid) whether he were poyſoned or no. But when the cauſe of the murder is laid in the indictment to be by poyſon, no evidence can be given of another cauſe, as by weapon, burning, drowning, or other cauſe, becauſe they be diſtinct and ſeveral cauſes: but if the murder be laid by one kind of weapon, as by a ſword, either dagger, ſtyletto, or other like weapon is ſufficient evidence, becauſe they be al under one claſſis or cauſe. And afterwards, Ann Turner, Sir Gervaſe Helwys, and Richard Franklyn a phyſitian, (purveyor of the poyſons) were indicted as acceſſories before the fact done: And it was reſolved by all the ſaid judges, that either the proofs of the poyſons contained in the indictment, or of any other poyſon were ſufficient to prove them acceſſories: for the ſubſtance of the indictment of them as acceſſories was, whether they did procure Weſton to poyſon Sir Thomas Overbury: and becauſe that not only Ann Turner, and Richard Franklyn, but ſome of the degree of nobility were indicted as acceſſories in another county, viz. in the county of Midd. divers notable points were reſolved upon the ſtatute of 2 E. 6. Firſt, if the acceſſory be in the county of Midd. where the kings bench is, and the principall did the felony, &c. in another county, that the court of the kings bench is within the words of that act, viz. (and that the juſtices of gaol-delivery, or oier and terminer, or two of them, &c.) for the cauſes and reaſons given in the lord Zanchers caſe, lib. 9. fo. 117, 118. &c. Secondly, if the indictment be taken in the kings bench, then the juſtices ſhall not write in their own names, *quia placita ſunt coram rege.* Thirdly, divers preſidents were ſhewed where the acceſſory was in the county of Midd. where the kings bench ſat, and the principall was attainted in another county, that the

Vid. li. 9. fo. 67. Mackallies caſe acc.

2 E. 6. cap. 24.

the juſtices of the kings bench have removed the record of the attainder of the principall before them by *certiorari*, and ſo it was done in the lord Zanchers caſe, *ubi ſupra*. The like preſident was ſhewed in a caſe where the principall was attainted in the county of Oxon, and the acceſſory was in Midd. and the kings bench ſitting there, the juſtices of the ſame court removed the attainder before them by *certiorari*. Fourthly, it was reſolved, that the lord ſteward of England, who is a judge in caſe of high treaſon, or felony committed by any of the peers of the realm, is within theſe words, juſtices of gaol-delivery, or oier and terminer, becauſe he is a juſtice of oier and terminer, for his authority is by commiſſion, and the words of his commiſſion be after divers recitals, *Et ſuperinde, audiend', examinand', et reſpondere compellend', et fine debit' terminand.*: ſo as he hath power to heare and determine. And where the words be [or any two of them] that is to be intended, where there be two or more juſtices, and yet where there is but one, it extendeth to him. As the ſtatute of Merton, cap. 3. power being given to the ſheriffe in caſe of rediſſeiſin, the words be, *aſſumptis tecum coronatoribus placitorum coronæ, &c.* in the plurall number. And yet where there is but one coroner in the county the ſtatute extends thereunto, and the ſheriffe ſhall take that one. Alſo the words of the ſtatute are further, That then the juſtices of gaol-delivery or of oier and terminer, or other there authorized: within which words, [or other there authorized] the lord ſteward is included. Fifthly, if the record of the attainder were by writ of *certiorari* removed out of London into the kings bench, then there aroſe another doubt upon the ſaid ſtatute, if afterward any proceeding ſhould be had againſt any peer, for that the words of the ſtatute be, The juſtices, &c. ſhall write to the cuſtos rotulorum or keeper of the record where ſuch principall ſhall hereafter be attainted; and the attainder in this caſe was in London, and the kings bench was in Middleſex: ſo as if the record ſhould be removed into the kings bench in Middleſex, the record ſhould not be where the attainder was had; and conſequently, the lord ſteward could not write to the kings bench. And therefore to prevent all queſtions, it was reſolved, that in this caſe of the lord ſteward, no *certiorari* ſhould be granted, but a ſpeciall writ ſhould be directed according to the words of the ſaid act to the commiſſioners of oier and terminer in London, to certifie whether the principall was convict or acquitted: and they made a particular certificate accordingly, ſo as the record of the attainder of the principall, did notwithſtanding that certificat, remain with the commiſſioners of oier and terminer in London: ſo as if any further proceeding ſhould be had, the lord ſteward might write to them, as after he did in the caſe of R. earl of S. and F. his wife.

39 H. 6. 42.
23 Aſſ. p. 7.



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And it is to be obſerved, that the ancient wall of London (a mention whereof doth yet remain) extended through the Tower of London; and all that which is on the weſt part of the wall, is within the city of London, viz. in the pariſh of All Saints Barking, in the ward of the Tower of London: and all that is on the eaſt part of the wall is in the county of Middleſex; and the chamber of Sir Thomas Overbury was within the Tower on the weſt part of the ſaid wall, and therefore Weſton was tried within the city of London.

And

And where it is often ſaid in many [a] acts of parliament, [b] records, and [c] book caſes, that the king cannot put any man to anſwer, but he muſt be appriſed by indictment, preſentment, or other matter of record. True it is, in pleas of the crown or other common offences, nuſances, &c. principally concerning others, or the publick, there the king by law muſt be appriſed by indictment, preſentment, or other matter of record: but the king may have an action for ſuch wrong as is done to himſelfe, and whereof none other can have any action but the king, without being appriſed by indictment, preſentment, or other matter of record, as a [d] *quare impedit*, [e] *quare incumbravit*, a writ of [f] attaint, [g] of debt, [h] detinue of ward, [i] eſcheat, [k] *ſcire fac. pur repealer patent*, &c.

[a] Mag. Cart. ca. 29. 5 E. 3. ca. 9. 25 E. 3. c. 4. ſtat. 5. 28 E. 3. ca. 3. 37 E. 3. cap. 18. 38 E. 3. cap. 9. 42 E. 3. cap. 3.

[b] Rot. clauſ. 28 H. 3. m. Rot. Parl. 15 E. 3. nu. 9, 10. & 15. 42 E. 3. nu. 29. Sir John A Lees caſe. 17 R. 2. nu. 37. 2 H. 4. nu. 60.

[c] 7 E. 3. fo. 26. 50. Vide 6 E. 3. fo. 33. & 8 E. 3. 30. 26 E. 3. 74. tit. Reſcous 21. 43 E. 3. 32. per Knivet. 2 E. 3. fo. 7. John de Britains caſe, 3 E. 3. 19. 45 E. 3. Decies tantum 12. [d] 5 E. 2. Quar. Imp. 167. 33 E. 3. Bre. 916. [e] 17 E. 3. 50. 74. F. N. B. 48. f. 13 E. 3. Juriſd. 23. [f] 42 E. 3. 26. F. N. B. 107. D. [g] 19 H. 6. 47. 34 H. 6. 3. &c. [h] 39 H. 6. 26. 1 H. 4. 1. 15 E. 3. Corody 4. [i] Regiſt. fo. 165. a. F. N. B. fo. 7. b. 21 H. 3. Bre. 882. Britton fo. 28. b. cap. 18. [k] 16 E. 3. Bre. 651.

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CAP. LXIII.

Of Councell learned in Pleas of the Crowne.

See before cap. 2. Petit Treaſon. fo. 29. 34. 9 E. 4. 22. Stanf. pl. cor. 151. b. otherwiſe it is in an appeale which is the ſuit of the party.

WHERE any perſon is indicted of treaſon or felony, and pleadeth to the treaſon or felony, not guilty, which goeth to the fact beſt known to the party; it is holden that the party in that caſe ſhall have no councell to give in evidence, or alleage any matter for him: but for as much as *ex facto jus oritur* it is neceſſary to be explained, what matters upon his arraignment, or after not guilty pleaded, he may alleage for his defence, and pray councell learned to utter the ſame in forme of law.

1. And firſt upon the arraignment what advantage he may take in caſe of high treaſon by the common law. If it be for compaſſing the death of the king, he may alleage, that in the indictment there is no ſuch overt or open act ſet down in particular, as is ſufficient in law or the like. For it is to be obſerved, that in no caſe the party arraigned of treaſon or felony, can pray councell learned generally, but muſt ſhew ſome cauſe.

* H. 7. 22.

2. Secondly, in caſe of high treaſon by force of any ſtatute, he may alleage, that the indictment being grounded upon a ſtatute, the ſtatute is either miſtaken or not purſued.

3. Thirdly, of what matters he may take advantage equally concerning them both. He may alleage, that there was not at the time of the indictment of high treaſon, two lawfull accuſers, that is, two lawfull witneſſes.

4. Fourthly, of what matters he may generally take advantage in all caſes of treaſon and felony. He may alleage, that the offence is not certainly alleaged in reſpect of the matter, time, and place, or that he

he is not rightly named, or have not a right addition, or that the offences were done before the laſt generall pardon.

Fifthly, after he hath pleaded not guilty, what advantage he may take upon the evidence: he may alleage, that he ought to have two lawfull witneſſes in caſe of high treaſon to prove the fact againſt him. 5.

Sixthly, he may take advantage in arreſt of judgement, if the verdict be found againſt him, that the triall came not out of the right place: as it fell out in Arundels caſe, convicted by a jury of wilfull murder; he informed the court that the jury that tried him came out of a wrong place, and thereupon he had councell learned aſſigned him; who indeed found, that the *venire facias* was miſawarded, and the court thereof by the councell being informed, judgement was ſtayed. And that the priſoner may alleage theſe or the like matters, it is evident, becauſe for every matter in law riſing upon the fact, the priſoner ſhall have councell learned aſſigned him. Alſo it is lawfull for any man that is in court, to informe the court of any of theſe matters, leſt the court ſhould erre, and the priſoner unjuſtly for his life proceeded with. And the reaſon wherefore regularly in caſe of treaſon and felony, when the party pleads not guilty, he was to have no counſell, was for two cauſes. Firſt, for that in caſe of life, the evidence to convince him ſhould be ſo manifeſt, as it could not be contradicted. Secondly, the court ought to ſee, that the indictment, triall, and other proceedings be good and ſufficient in law; otherwiſe they ſhould by their erroneous judgement attaint the priſoner unjuſtly. 6. Lib. 6. fo 14. Arundels caſe. 9 E. 4. 22. Stanf. ubi ſup. 7 H. 4. 34, &c. See before fo. 19.

Robert Chirford counſelled the prior of the priory of Binham in Norfolke, that John of Leiceſter the kings ſerjeant at armes, comming to the priory with the kings writ of privie ſeale, ſhould not be admitted to the priory: for which counſell he was indicted in the kings bench, and depending the proces upon the indictment, the king doth pardon him: and in the pardon is contained a *ſuperſedeas* to the juſtices, commanding them to proceed no further. Rot. clauſ. 14 E. 2. 17. 27 Octob.

CAP. LXIV. [138]

Of Principall and Acceſſory.

ALBEIT juſtice Stanford hath well collected the books concerning principall and acceſſory, yet *diverſa deſiderantur*: and neceſſary it is, that ſome things touching the ſame ſhould be added, which are very neceſſary to be knowne.

It is a ſure rule in law, that *in alta proditione nullus poteſt eſſe acceſſorius, ſed principalis ſolummodo.* This rule being well underſtood, will open the reaſon of divers caſes, which yet are involved in darkneſſe.

High treaſon is either by the common law, or by act of parliament: we will ſet downe examples (which ever do illuſtrate) of both.

Mich. 12 & 13 Eliz 296. Dier, Coniers caſe.

A. doth counterfeit the kings coine, viz. ſhillings, and C. knowing the ſame doth receive A. and comfort and aide him: this counterfeiting is high treaſon by the common law in A, as hath been ſaid: and yet it hath beene holden that in this caſe C. hath not committed treaſon: for ſay they, in caſe of felony, a receiver of a felon after the felony done, knowing him to be a felon, is no principall, but an acceſſory: and for that there is no acceſſory in treaſon, therefore C. in the caſe before committeth no treaſon; for then in judgement of law he muſt be a counterfeiter of the kings coine within our ſtatute of 25 E. 3. which he is not: and therefore they ſay, this is *caſus omiſſus*, and not within any of the claſſes or heads of the ſaid act of 25 E. 3. But all agree, that procurors of ſuch treaſon to be done before the fact done, if after the fact be done accordingly, in caſe of treaſon, are principals, for that they are *participes criminis* in the very act of counterfeiting.

[a] 19 H. 6. 47. 3 H. 7. 10. Stanf. fo. 3. See before cap Treaſon. Verb. Si homo counterface le grand ſeale.

[a] But ſaving reformation we hold, that if any man committeth high treaſon, and thereby becommeth a traytor, if any other man knowing him to be a traytor, doth receive, comfort, and aide him, he is guilty of treaſon, for that there be no acceſſories in high treaſon.

[b] Paſch. 4. Jac. Abingdons caſe reſolved by the juſtices.

[b] And ſo it was reſolved in the caſe of Abingdon, who received, comforted, and aided Henry Garnet ſuperior of the jeſuits, knowing him to be guilty of the powder treaſon, and accordingly Abingdon was indicted and attainted of high treaſon.

[c] M. 12 & 13 El. ubi ſupra. See before ca. 3. Of Miſpriſion of Treaſon.

[c] And where it is ſaid, that the ſaid offence in Conyers caſe was miſpriſion of treaſon, that cannot be, becauſe there was a conſent, and not a concealment only: otherwiſe, high treaſon being the higheſt offence, ſhould have more favour, then felony: for the receiver and comforter in caſe of felony is puniſhed by death, and ſo is not he that committeth miſpriſion of treaſon. And laſtly, this is no new treaſon, but a partaking and a maintaining of the old.

[d] 7 H. 4. 27. 21 E. 4. 71. 13 H. 7. 10. Pl. com. Lib. 4. fo. 42. in Heydons caſe. Lib. 9. fo. 67. Mackallyes caſe. & lib. 11. fo. 5.

In caſe of felony there are principals and acceſſories, and acceſſories be of two ſorts, either before the offence be committed, or after. See the ſecond part of the Inſtitutes, W. 1. cap. 14. And concerning this, there be alſo certaine rules, [d] *Nullus dicitur felo principalis, niſi actor, aut qui præſens eſt abettans, aut auxilians actorem ad feloniam faciendam.* But this rule hath his exception: for [e] in caſe of poyſoning, if one layeth poyſon for one, or infuſe it into broth, or the like, albeit he be not preſent when the ſame is taken; and either the party intended, or any other is poyſoned, yet is he a principall: and in that caſe, both the principall and procurer, or acceſſory may be abſent. See the bookes aforeſaid for acceſſories before the felony committed, and where and in what manner the procurement ſhall be ſaid in law to be purſued: the learning whereof is ſo plainly ſet downe, as the ſame need not herein to be repeated.

[e] Lib. 4. fo. 44. Vaux's caſe. Pl. com. fo. 474. Saunders caſe. Lib. 9. 81. Agnes Gores caſe. See Paſc. 32. E. 3. coram rege rot. 62. Ph. Cliftons caſe.

[f] 25 E. 3. 39. b. cor. 126. 26 Aſſ 47. 9 H. 4. 1. 7 H. 6. 42.

[f] *Nullus dicitur acceſſorius poſt feloniam, ſed ille qui novit principalem feloniam feciſſe, et illum receptavit * et comfortavit.*

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[a] 26 Aſſ. ubi ſup.

[a] And therefore if a man write letters for his deliverance, or in favour of him, or the like; he is no acceſſory, for that he received not the felon.

[b] Mic. 7 R. 2. coram rege rot. 23. Cant. 7 H. 4. 27.

[b] A vicar, which inſtructed an approver which could not reade, whileſt he was in priſon, to reade, whereby he eſcaped, was adjudged no acceſſory to the felony.

Catlyn

Catlyn and Browne juſtices of aſſiſe in the county of Suffolke put this caſe to all the judges. [c] A man committed felony in the county of Suffolke, for which he was committed to the gaole; and R. an attorny adviſed the friends of the felon to perſwade the witneſſes not to appeare to give evidence againſt him, which was done accordingly. And it was reſolved, that neither the friends nor the attorny were acceſſaries to the felony, but that it was a great contempt and miſpriſion, for which they might be fined and impriſoned.

[c] Mic. 11 & 12 Eliz. cap. Roberts the attorny.

[d] The acceſſory cannot be guilty of petit treaſon, where the principall is guilty but of murder. For *acceſſorius ſequitur naturam ſui principalis.*

[d] See before cap. Petit Treaſon.

[e] If divers commit any murder, or other felony, one man may be both principall and acceſſory to the other.

[e] 7 H. 4. 27.

See before cap. Clergie, that if the principall before attainder hath his clergie, the acceſſory is diſcharged. And note generally, where the principall before attainder is pardoned, or his life otherwiſe ſaved, the acceſſory is diſcharged.

[f] 2 H. 4. 16.

CAP. LXV.

Of Miſpriſions divers and ſeverall: and firſt of Miſpriſion of Felony, &c.

OF miſpriſion of treaſon we have already ſpoken, and of the etymologie of the word. It remaineth now that we ſpeak of other miſpriſions.

Miſpriſion is twofold: one is *crimen omiſſionis*, of omiſſion, as in concealement, or not diſcovery of treaſon or felony: another is *crimen commiſſionis*, of commiſſion, as in committing ſome heynous offence, under the degree of felony.

Or miſpriſion is of two ſorts, viz. paſſive and active: paſſive is of the nature of concealment, whereof ſome be by the common law, and ſome by ſtatute. By the common law, as paſſive miſpriſion, that is concealement of high treaſon whereof we have ſpoken; and paſſive miſpriſion, that is concealement of felony, whereof we are now in this chapter to ſpeak. Some by ſtatute: as if any be moved to make commotion or unlawfull aſſembly, and do not within twenty four houres declare the ſame to a juſtice of peace, ſheriffe, maior, or bailiffe, &c. concealement by juries, 3 H. 7. ca. 1. 33 H. 8. ca. 6, &c.

1 Mar. 1. Parl. ca. 12. 1 Eliz. cap. 17.

Now are we ſpeak of concealement or not diſcovery of felony. As in caſe of high treaſon, whether the treaſon be by the common law, or ſtatute, the concealment of it is miſpriſion of treaſon. So in caſe of felony, whether the felony be by the common law, or by ſtatute, the concealement of it is miſpriſion of felony.

See the ſecond part of the Inſtitutes. W. 1. cap. 9.

If any be preſent when a man is ſlaine, and omit to apprehend the ſlayer, it is a miſpriſion, and ſhall be puniſhed by fine and impriſonment.

8 E. 2. cor. 395.

And as the concealment of high treaſon is higher by many degrees then the concealment of felony, ſo the puniſhment for the concealment of the greater is heavier then of the leſſer, and yet

W. 1. ca. 9. See the expoſition thereof, ubi ſup.

the concealment of felonies in ſherifs, or bailiffs of liberties is more ſeverely puniſhed then in others, viz. by impriſonment by one year, and ranſome at the will of the king. From which puniſhment * if any will ſave himſelf he muſt follow the advice of Bracton, to diſcover it to the king, or to ſome judge or magiſtrate, that for adminiſtration of juſtice ſupplieth his place, with all ſpeed that he can.

Bract. lib. 3. fo. 118. a. *Non enim debet morari in uno loco per duas noctes, vel per duos dies, nec debet ad aliqua negotia, quamvis urgentiſſima, ſe convertere, quia vix permittitur ei ut retroſpiciat.*

And this is intended of a concealment, or not diſcovery of his meer knowledge: for if in caſe of high treaſon, he that knoweth it, before it be done, and aſſenteth to it, is *particeps criminis*, and guilty of treaſon: and in caſe of felony, he that receiveth the thief, and aſſenteth to it, is acceſſory.

See before the chapt. of Miſpriſion of Treaſon, fo. 36. and of Principall and Acceſſory, fo. 138.

See before in the chapter of miſpriſion of treaſon, that every treaſon and felony doth include in it miſpriſion of treaſon and felony. See the ſtatute of 23 El. ca. 1. of miſpriſion, that is, *crimen commiſſionis.*

* Eccleſiaſtes. ca. 10. v. 20.

Compaſſings, or imaginations againſt the king, by word, without an overt act, is an high miſpriſion, as before is ſaid. * *In cogitatione tua ne detrahas regi, &c. quia aves cœli portabunt vocem tuam, et qui habet pennas annunciabit ſententiam.*

a See the ſecond part of the Inſtitutes, W. 1. ca. 33. 25 E. 3. ca. 1. It is high treaſon to kill any of them in their places.

a If any man in Weſtminſter hall, or in any other place, ſitting the courts of chancery, the exchequer, the kings bench, the common bench, or before juſtices of aſſiſe, or juſtices of oier and terminer, (which courts are mentioned in the ſtatute of 25 E. 3. *De proditionibus*) ſhall draw a weapon upon any judge, or juſtice, though he ſtrike not; this is a great miſpriſion, b for the which he ſhall loſe his right hand, and forfeit his lands and goods, and his body to perpetuall impriſonment: the reaſon hereof is, becauſe it tendeth *ad impedimentum legis terræ.* c So it is, if in Weſtminſter hal or any other place, ſitting the ſaid courts there, or before juſtices of aſſiſe, or oier and terminer, and within the view of the ſame, a man doth ſtrike a juror, or any other with weapon, hand, ſhoulder, elbow, or foot, he ſhall have the like puniſhment; but in that caſe, if he make an aſſault, and ſtrike not, the offender ſhall not have the like puniſhment.

b 22 E. 3. 13. 19 E. 3. Judgment 174. Mich. 6 E. 3. coram rege Rot. 55. Eborum. 41 E. 3. cor. 280. Nota the forfeiture of his lands is but during his life. 41 E. 3. 25.

c Int. leges Alveredi. cap. 34. 3 El. Dier, 188. 2 Ja. Bellinghams caſe coram rege with his elbow and ſhoulder.

d If any ſtrike in the kings palace, where the kings royall perſon reſideth, he ſhall not loſe his right hand, unleſſe he draw blood; but if he draw blood, then his right hand ſhall be ſtrucken off, he perpetually impriſoned, and fined and ranſomed.

d 33 H. 8. ca. 12.

Note the law makes a great difference between a ſtroke or blow, in or before any of the ſaid courts of juſtice, where the king is repreſentatively preſent, and the kings court, where his royall perſon reſideth. For in the kings houſe (as hath been ſaid) blood muſt be drawne, which needeth not in or before the courts of juſtice, but a ſtroke only ſufficeth. Again, the puniſhment is more ſevere in the one caſe, then in the other: ſuch honour the law attributeth to courts of juſtice, when the judges or juſtices are doing of that which to juſtice appertaineth: and the reaſon is, *Quia juſtitia firmatur ſolium.*

But note that by the ancient laws of this realm, ſtriking only in the kings court was puniſhed by death. *Vide Lambard inter leges Inæ ca. 6. Si quis in regia pugnarit, rebus ſuis omnibus mulctator, et ſine morte etiam plectendus, regis arbitrium et jus eſto. Inter leges Canuti,*

nuti, cap. 56. *Si quis in regia dimicarit, capitale eſto, &c. Inter leges Alvereai, cap.* 7. *Qui in regia dimicarit, ferrumve diſtrinxeret, capiter, et regem penes arbitrium vitæ neciſque ejus eſto, &c.*

[c] Peter Burchet priſoner in the tower, ſtroke within the tower John Longworth his keeper (who ſtood in a window reading of the Bible) with a billet on the head behind, whereby blood was ſhed, and death inſtantly enſued: this being without any provocation was adjudged murder, for which he was attainted, and before his execution (which was in the Strand over againſt Somerſet houſe) his right hand was firſt ſtrucken off, by force of the ſtatute of 33 H. 8. for that the tower was one of the queens ſtanding houſes or palaces.

[c] Mich. 15 El. in the caſe of Peter Burchet eſquire of the Middle Temple.

Paſch. 8. E. 2. Coram rege Rot. 28 Norff.

The kings palace at Weſtminſter hath this liberty and priviledge, viz. *Nullæ citationes, aut ſommonitiones, liceant fieri cuicunque infra palatium regis Weſtm.*

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Like priviledge hath Weſtminſter hall, or other place, where the kings juſtices, &c. ſit, as by theſe following records appeareth.

[a] *Quia bedellus univerſitatis citari fecit Will. de Wivelingham infra oſtium aulæ Weſtm. juſticiariis ſedentibus, ad comparend' coram cancellario, &c. pro quo ſe poſuit in gratiam regis, committitur gaolæ, et Henricus de Harwood, ad cujus ſectam proſecutus fuit, committitur mariſchal. et finem fecit* 40. *s.*

[a] Mich. 12 E. 3. Coram rege Rot. 101. Cant.

[b] *Matilda de Nyerford, filia Willielmi de Nyerford militis defuncti,* did libell againſt John earl of Warren, and [c] Johan de Barro countes of Warren the kings niece *(in camitina dominæ reginæ conſortis domini regis)* in a cauſe of matrimony and divorce, and the ſame Johan de Barro was cited in the kings palace at Weſtminſter, &c. It was upon full examination of the cauſe, adjudged in parliament in theſe words, *Quòd prædictum palacium domini regis eſt locus exemptus ab omni juriſdictione ordinaria, tam regiæ dignitatis et coronæ ſuæ, quam libertatis eccleſiæ Weſtm', et maximè in præſentia ipſius domini regis tempore parliamenti ſui ibidem: ita quòd nullus ſummonitiones, ſeu citationes ibidem faciat, et præcipuè illis, qui ſunt de ſanguine domini regis, quibus major reverentia, quam aliis fieri debet, &c. Conſideratum eſt, quod officiar' committatur turri London, et ibidem cuſtodiatur ad voluntatem domini regis.*

[b] Placita coram domino rege in parliamento ſuo apud Weſtm' in præſentia domini regis, an. 21 E. 1.

[c] Ellanor daughter of E. 1. married with William earl of Barry alias Barro in France, and had iſſue the ſaid Johan who married John earl Warren.

Here two things are principally to be obſerved; firſt, that this royall priviledge is not only appropriated to the palace of Weſtminſter, but to all the kings palaces, where his royall perſon reſides. Secondly, that this priviledge is to be exempted from all eccleſiaſticall juriſdiction, *regiæ dignitatis et coronæ ſuæ ratione, &c.*

If any doe reſcue a priſoner in or before any of the aboveſaid courts committed by any of the aforeſaid juſtices, it is a great miſpriſion, for which he and the priſoner aſſenting to it, ſhall forfeit their lands and goods, and their bodies to perpetuall impriſonment, but ſhall not loſe his hand, becauſe no ſtroke or blow was given.

22 E. 3. 13.

But it was reſolved by all the judges, that where Thomas Oldfield, ſitting in the court of the dutchy of Lancaſter, with a knife ſtabbed one Ferror a juſtice of peace in the view of the ſaid court, that the court of the dutchy was none of the courts to make it a miſpriſion to loſe his right hand, &c. but the offender was to be indicted, and grievouſly fined.

Trin. 8 Jac. regis Oldfields caſe.

And in 9 El. one Guirling ſtroke another in the Whitehall, ſitting

Paſch. 9 Eliz. Guirlings caſe.

ſitting the maſters of requeſts, and it was then reſolved by the court of kings bench, that it was not any miſpriſion, for the which he ſhould loſe his right hand, &c. but he was indicted and fined.

Hil 13 E. 3. Coram rege Rot. 104. Suff.

Quia Thomas de Holbroke manus violentas impoſuit ſuper Johannem de Loudham, &c. ad ſeſſionem ſuam ſedentem apud Gipwicum, et eum dementitus eſt, committitur in parliamento turri London, et finitur 20. li. et invenit ſex milites mainoptores pro bono geſtu ſuo.

And where ſome of the books aboveſaid ſay, that the offender ſhall forfeit his lands, and ſome that he ſhall be diſherited, yet the forfeiture of his lands is only for tearm of his life, (as before is ſaid:) for being no felony, the blood is not corrupted, nor the heir diſinabled to inherit. And this ſevere puniſhment is at the ſuit of the king, and the party may have his action, and it ſhall be tried by the officers and criers. And for ſuch a ſtroke Thomas of Whitteſley recovered five hundred pounds, Trin. 9 E. 3. Rot. 154. Midd.

Trin. 9 E. 3. Rot. 154. Midd.

Brit. ca. 25. fo. 47.

Britton ſaith, *Aſcuns treſpaſſes ſont nequedent pluis puniſhable, ſi come treſpas fait en temps de peace a * chivaliers, ou auters gents honorables per ribawes, ou auters viles perſons; en quel caſe nous volons, que ſi ribawe ſoit attaint al ſuit de cheſcun chivalier, que il eyt ſerue per felony ſans deſart del chivalier que le ribawe perd ſon pome dont il treſpaſſa:* ſo great a reſpect in thoſe days was had of honour and order. Ribawe is taken here for a raſcall ruffian. There is a great miſpriſion when any revenge is ſought againſt a judge, juſtice, officer, juror, ſerjeant, councellor, miniſter, or clerk, for that, which they doe in diſcharge of their ſeverall duties, offices, and places, concerning the adminiſtration of juſtice.

* Nota for the dignity of knights.

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Mich. 33. & 34 E. 1. Coram rege, Rot. 75.

Roger de Hegham and others being juſtices of oier and terminer, and ſitting in the exchequer chamber, gave judgement for Mary late the wife of William Brewſe plaintif, againſt William le Brewſe defendant, which judgement was pronounced by Roger de Hegham. William de Brewſe demanded of Roger de Hegham if he would avow the judgement, and ſaid, Roger, Roger, now thou haſt thy will which of long time thou haſt ſought: of whom Roger de Hegham demanded, What is that? to whom William de Brewſe ſaid, My ſhame, and my loſſe, and this I will reward or recompence, or I will think of it. Whereof he being indicted and arraigned, and confeſſing the offence, the record ſaith. *Et quia ſicut honor, et reverentia, qui miniſtris domini regis ratione officii ſui faciuntur, ipſo regi attribuuntur; ſic dedecus et contemptus miniſtris ſuis fact' eidem domino regi inferuntur; conſideratum eſt quòd præd. Willielmus de Brewſe, diſcinctus in corpore, capite nudo, tena depoſita, eat e banco domini regis ubi placita teneritur in aula Weſtm', per medium aulæ prædict', cum curia plena fuerit, uſque ad ſcaccarium (ubi deliquit) et ibidem veniam petit a præfato Rogero, &c. et poſtea committitur turri London, ibidem moratur', ad voluntatem regis.*

Nota.

Bract. lib. 2. 105. Theſe words were given to the treaſurer of England by the procurement of Pierce of Gaveſton.

Note this exemplary judgement againſt a gentleman of a great and honourable family. *Quælibet pœna corporalis, quamvis minima, major eſt qualibet pœnæ pecuniaria.* And in that record it is ſaid, *Quòd dominus rex filium ſuum primogenitum, et chariſſimum Edwardum principē Walliæ, pro eò quòd quædam verba groſſa cuidam miniſtro ſuo dixerat, ab hoſpitio ſuo furè per dimidium anni amovit, nec ipſum filium ſuum in conſpectu ſuo venire permiſit, quouſque dicto miniſtro de dicta tranſgreſſione ſatisfecerat.*

Quia

Quia Petrus de Scales minatus fuit Ricũm de Worlingworth, qui fuit de conſilio Johannis de Moten, de vita et membris, dictus Petrus invenit plegios de b.no geſtu ſuo. Hil. 20 E. 3. Coram rege Rot. 160.

There be many records for abuſing of jurours, viz. Paſch. 10 E. 3. Coram rege, rot. 87. Gilbertus Twiſt. Paſch. 26 E. 3 ibidem, rot. 22. Eſſex, Tho. Hubberd, Hil. 7 H. 5. ibidem, rot. 24. Ricũs Cheddre. Mich. 17 E. 2. Coram rege rot. 63.

Percuſſio clerici curiæ in veniendo verſus curiam, &c. Trin. 11 E. 2. Coram rege, rot. 42. London. Not only theſe particular revenges aboveſaid, but all other of what kind ſoever are great miſpriſions.

Alſo when any revenge is ſought againſt any man for complaining in any of the kings courts, *ſuper gravaminibus, &c.* for grievances, &c. *Quia deterret homines à querelis ſuper gravaminibus in forma juris. De hiis qui vindictam fecerint, eo quod aliquo modo ſuper prædictis gravaminibus in curia domini regis conqueſti fuerunt.* Cap. Itineris §. ultimo.

Juſticiarii taxaverunt damna 2 marc' ſuper Willielmum Boteſford, eo quòd minabatur quandam Hawiſiam de vita et membris, eo quòd ipſa proſequebatur ipſum in placito tranſgreſſionis. Paſc. 10 E 3. Coram rege Rot. 86. Linc.

We will conclude this point for private revenge with an ancient law before the conqueſt. *Si quis privato conſilio illatam ſibi injuriam vindicarit, antequam jus æquum ſibi dari poſtulaverit, quod nomine vindictæ eripuit reddito, integrum rei pretium præſtato, et* 30 *ſolidos dependito.* Inter leges Inæ, cap. 9. Lamb.

See in the fourth part of the Inſtitutes, cap. Of the chancery, in the articles againſt Cardinall Woolſey. Artic. 4, 5, 6. 11. 41. See the 4. part of the Inſtit. cap. Chancery.; Artic. verſ. Cardinal Woolſey. Art. 4. 5, 6. 11. 41.

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CAP. LXVI.

Of CONSPIRACIE.

"CONSPIRACIE [a] is a conſultation and agreement between two or more, to appeale, or indict an innocent falſely, and maliciouſly of felony, whom accordingly they cauſe to be indicted or appealed; and afterward the party is lawfully acquited by the verdict of twelve men: the party grieved may be relieved, and the offender puniſhed two wayes. Firſt, by a writ of conſpiracy, which is a civill or common action at the ſuit of the party, wherein the plaintife ſhall recover damages, and the defendant ſhall be impriſoned. Secondly, by indictment at the ſuit of the king, the judgement whereof is criminall: of which we are now to ſpeak.

[b] Upon this ſuit of the king, if the offenders be convicted, the judgement is grievous and terrible, viz. That they ſhal loſe the freedom or franchiſe of the law, to the intent that he ſhall not be put or had upon any jury or aſſiſe, or in any other teſtimony of truth: and if they have any thing to do in the kings courts, they ſhall come [c] *per ſolem, id eſt*, by broad day, and make their attorny, and

[a] Vide ſtatut. de conſpiratoribus, anno 21 E. 1. vet. Mag. Cart. part 1. fo 111. & definition conſpir. 33 E. 1. ibid. fo. 90. b. Artic. ſup. Cart. cap. 10. F. N. B. 114, 115. Stanf. pl. cor. 172, &c. Lib. 4. fo. 45. Lib. 9. fo. 16, 56, 57. 78.

[b] 24 E. 3. 45. 27. aſſ. 43 E. 3. Conſpiracy, 11. 59. 4 H. 5. Judgement 120. the like judgement as in attaint. See the firſt part of the Inſtitutes. Sect.

[c] Trin. 18 E. 3. Coram rege, Rot. 148. Paſch. 32 E. 3. Coram rege. Rot. 58.

forthwith return by broad day: and their houſes, lands, and goods, ſhall be ſeiſed into the kings hands, and their houſes and lands eſtrepped and waſted, their trees rooted up and erraſed, and their bodies to priſon: all things retrograde, and againſt order and nature, in deſtroying all things that have pleaſured or nouriſhed them; for that by falſehood, malice, and perjury, they ſought to attaint and overthrow the innocent. Which judgement in our books is called, a villanous judgement. Firſt, in reſpect of the villainy and ſhame, which the party hath which receiveth it. Secondly, for that by the judgement he loſeth the freedom and franchiſe of the law, and therefore undergoeth a kinde of bondage and villany. And the reaſon of this heavy and terrible judgement is: 1. For that the offenders have conſpired and plotted the death and ſhedding of the blood of an innocent. 2. That they do it under faire pretence of juſtice and by courſe of law, which was inſtituted for the protection and defence of the innocent. 3. That if they had attainted the innocent, he ſhould have loſt his life, (by an infamous death) his lands, his goods, and his poſterity: for his blood thereby ſhould have been corrupted, &c. 4. All this falſhood, malice, and perjury is committed *in placito coronæ*, in a ſuit for the king, which aggravateth and increaſeth the offence; for that the king is the head of juſtice, and a protector of the innocent: and therefore at the kings ſuit, and not at the ſuit of the party, this villanous judgement ſhall be given. So as the law hath excellently diſtributed the remedies; the private action of the party to give him damages, &c. and the ſuit of the king for exemplary puniſhment. And it is to be obſerved, that this villanous judgement is given by the common law, (as in the caſe of attaint) and not by force of any ſtatute.

27 Lib. aſſ. p. 12. King E. 3. demanded of his juſtices and ſerjeants, whether divers men being indicted of conſpiracy for the indicting of R. of felony, were mainperuable or no? and they anſwered the king expreſly, that they were not, in reſpect of the odiouſneſſe of the offence.

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CAP. LXVII.

Of Penſions, &c. received by Subjects, of Foraine Kings, &c.

See the fourth part of the Inſtitutes, cap. the Chancery Artic. againſt Cardinall Woolſey, art. 27. Vide p. rl. 7 R. 2. nu. 16. Mat. ca. 26. v. 24.

IT is not lawfull for any ſubject of the king of England to take a penſion, &c. of any foraine king, prince, or ſtate (without the kings licenſe) albeit they be in league with the king of England; both, for that they may become enemies, and for that alſo it is miſchievous and dangerous to the king himſelf and his ſtate, as it appeareth by this diſtichon,

Principe ab externo veniunt lethalia dona,
Quæ ſtudii ſpecie, fata, necemque ferunt.

And this was (ſay they) the caſe of the lord Haſtings chamberlaine to king E. 4. who in the fifteenth year of his raign, received a penſion

* *Nemo poteſt duobus dominis ſervire: aut enim unum odio habe-*

a penſion of two thouſand crowns yearly from the French king: who being informed by juſt. Cateſbye his inward friend, and others learned in the law, that the receiving hereof was an offence againſt law, being deſired by Pierce Clerett a Frenchman (who paid the penſion) to make him an acquitance for receipt thereof for his diſcharge, utterly refuſed the ſame. This report I do the rather hold to be true, for that all our Engliſh hiſtorians, (who for the moſt part rehearſe but the carkaſſe or outſide of any point in law) give great credit hereunto. And what ill conſequence this and other like penſions, and others of the councell of king E. 4. had, you may reade in our hiſtories.

See the caſe in 7 R. 2. of [a] Spencer biſhop of Norwich; and there alſo the caſe of [b] Pierce Creſſingham, and others: and of [c] ſir William Ellingham and others, puniſhed for receiving of money, &c. of the French king, which drew them without the kings licenſe, to yeeld up caſtles and forts in France committed to their cuſtody, puniſhed by fine and impriſonment.

See the fourth part of the Inſtitutes, cap. of the Chancery, artic. 27. againſt Cardinall Woolſey.

bit, et alterum diliget, aut unum ſuſtinebit, et alterum contemnet. 4 Regum, ca. 5. v. 26, &c. Geh.ſi. See 3 Jac. ca. 5. concerning the ſervice of a ſubject as a ſouldier or captain to a forain prince, hereafter cap. Fugitives. *Polydor. Hall. Hollingſhed. Stowe, &c.*

[a] Rot. Parl. 7 R. 2. nu. 15. 18. 20. 21, 22, 23.

[b] Ibid. nu. 17.

[c] Ibid. nu. 24.

CAP. LXVIII. [145]

Of Bribery, Extortion, Exaction, &c.

And firſt of Bribery.

BRIBERY is a great miſpriſion (1), when any man in judiciall place (2) takes any fee or penſion, robe, or livery, gift, reward (3) or brocage (4) of any perſon, that hath to do before him any way (5), for doing his office, or by colour of his office, but of the king only, unleſſe it be of meat and drink, and that of ſmall value, upon divers, and grievous puniſhments. Forteſcue, ca. 51.

This word [bribery] commeth of the French word *briber*, which ſignifieth to devoure, or eat greedily, applyed to the devouring of a corrupt judge, of whom the Pſalmiſt ſpeaking in the perſon of God, ſaith, *Qui devorat plebem meam ſicut eſcam panis. Qui cognoſcit faciem in judicio, non bene facit: iſte pro buccella panis deſerit veritatem.* Pſalm 13. 4. Prov. 28. 21.

But let us perule the branches of this deſcription.

(1) *A great miſpriſion.*] But it may be objected, that bribery in a judge was ſometime adjudged a higher offence. For whereas at the aſſizes holden at Lincolne in the 23 yeare of E. 3. an exigent was to have been awarded againſt Richard Saltley, Hildebrand Boreſward, Guilbert Holliland, Thomas Derby, and Robert Dalderby, who formerly had been indicted of divers felonies before ſir William Thorpe, chiefe juſtice of the kings bench, and one of the juſtices of aſſize of the ſaid county of Lincolne, he the ſaid ſir William Rot. Pat. anno 24 E. 3. part 3. m. 2. and Rot. Pat. anno 25 E. 3. part 1. m. 17. Rot. Parl. 25 E. 3. nu. 10. 23 E. 3.

William Thorpe, to ſtay the ſaid writ of exigent againſt them, *cepit munera contra juramentum ſuum*, viz. of Richard Saltly, 10 li. of Hildebrand, 20 li. of Holliand, 40 li. of Derby, 10 li. and of Dalderby, 10 li. King Edward the third appointed the earles of Arundell, Warwick, and Huntingdon, and two lords, the lord Grey and the lord Burghers' to examine this matter. Before whom ſir William Thorpe being charged with the ſaid bribery, *Non potuit dedicere, &c.* Now the record ſaith, *Conſideratum eſt per dictos juſticiarios aſſignatos ad judicand. ſecundum voluntatem domini regis, et ſecundum regale poſſe ſuum, quòd quia prædictus Willielmus de Thorpe, qui ſacramentum domini regis, quod erga po ulum ſuum habuit cuſtodiendum, fregit malicioſe, falſe, et rebelliter in quantum in ipſo fuit, et ex cauſis ſupradictis per ipſum Willielmum, ut prædictum eſt, exiſtere cognitis, ſuſpendatur, et quod omnia træ. et tenta., bona et catalia ſua remaneant forisfacta.* This ſentence ſeemeth to have his foundation as well upon the oath of the judges, (for the record ſaith) *contra juramentum ſuum*, and the concluſion of the oath, and in caſe ye be found in any default in any of the points aforeſaid, ye ſhall be *ad voluntatem regis*, of body, lands, and goods, thereof to be done as pleaſeth him: as alſo for that this laſt clauſe is enacted by authority of parliament (as they ſay) in *anno* 20 E. 3. And hereupon they the ſaid lords were appointed to judge *ſecundum voluntatem domini regis, et regale poſſe ſuum*, according to the words of the oath and act of parliament. And this judgement was repeated in *anno* 25. to the lords, and affirmed by them.

Anno 24 E. 3.

The oath of the juſtices anno 18 E. 3.

20 E. 3. cap. 1.

This preſident is not to be followed at this day for divers cauſes. Firſt, it ſeemeth by the violation of the kings oath, and of this word [*rebelliter*] and by the forfeiture of all his lands and tenements to the king, that this offence ſhould be treaſon againſt the king, and then it being either high treaſon, or petit treaſon, it is taken away by the ſtatute of 25 E. 3. *De proditionibus*, the ſame being none of them, that are there expreſſed. And in all the records this word [*felonice*] is not to be found, as it ought to have been, if it had been felony.

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Neither by the words of the oath, or of the ſuppoſed act of 20 E. 3. can the judgement *(quòd ſuſpendatur)* be warranted: for theſe words [to be at the kings will for body, &c.] cannot be extended to loſſe of life, no more then the ſtatute of Carliſle *(ſub forisfacturâ omnium, quæ in poteſtate ſua obtinet)* extendeth not to forfeiture of life, but to impriſonment, &c. viz. loſſe of liberty, &c.

Anno 35 E. 1. the ſtat. of Carliſle.

20 E. 3. cap. 4.

But at this parliament, viz. in *anno* 20 E. 3. taking in hand of quarrels, other then their own, and maintenance of them is prohibited upon the paines aforeſaid, viz. the paines contained in the ſaid ſuppoſed act of 20 E. 3. cap. 1. upon paine to be at our will, body, lands, and goods, to do thereof as ſhall pleaſe us: which without queſtion was never extended to loſſe of life, &c. but to impriſonment, as common experience daily teacheth. For *hæc eſt voluntas regis, viz. per juſticiarios ſuos et per legem, &c.* Therefore as by the record appeareth, ſir William Thorpe was pardoned and reſtored to all his lands. And we were deſirous to ſee the record of the act of 20 E. 3 cap. 1. but there is no record of any ſuch act in the parliament roll. And the very frame and compoſition of it ſeemeth to be but a rehearſall of a commandment from the king: for the letter of it beginneth. Firſt, we have commanded all our juſtices,

2 R. 3. fo. 11.

See 8 R. 2. cap. 3. Rot. Parl. 10 R. 2. nu. 24.

juſtices, that they ſhall from thenceforth do equall law, &c. and therefore juſtly omitted out of the parliament roll of acts of parliaments: and yet the imprinting of it neceſſary, for that the fourth chapter of this parliament hath reference to the paynes contained in it.

It is enacted by Parliament *anno* 11 H. 4. in theſe words. Vid. 1 H. 4. nu. 99. & Nota.

Item, *Que nul chancelor, treaſorer, garden del privie ſeal counſelor le roy, ſernts. a councell del roy, ne nul auter officer, judge ne miniſter le roy, pernants fees ou gages de roy pur lour ditz offices ou ſervices, preigne en nul manner en temps à vener aſcun manner de done ou brocage de ulluy pur lour ditz offices et ſervices a faire, ſur peine de reſponder au roy de la treble que iſſint preignont, et de ſatisfier la partie, et punys al volunt le roy, et ſoit diſcharges de ſon office, ſervice, et councell pur touts jours, et que cheſcun que voiera purſuer en la dit matter, eyt la ſuite cibien pur le roy, come pur luy meſme, et eit la tierce part del ſomme, de que la partie eſt duement convict.* Rot. Parl. anno 11 H. 4. nu. 28. never imprinted.

By this act of parliament, which is the judgement of the whole parliament, it appeareth, that, if that which is imprinted as the firſt chapter of 20 E. 3. had been an act of parliament, then this ſtatute of 11 H. 4. would never have inflicted this kinde of puniſhment, which is other, and farre leſſe, then that which is mentioned in 20 E. 3. and where it is ſaid in this act of 11 H. 4. *(et punis al volunt le roy)* that is, by fine and impriſoment by the court where the conviction ſhall be; for, as hath been ſaid, *hæc eſt voluntas regis, viz. per juſticiarios ſuos, et legem ſuam, et non per dominum regem in camera ſua, vel aliter.* 2 R. 3. 11. a.

So as by warrant of this act of parliament we have ſaid, that bribery is a miſpriſion; for that it is neither treaſon, nor felony; and it is a great miſpriſion, for that it is ever accompanied with perjury.

* True it is, that ſir Thomas Weyland, chief juſtice of the court of common pleas, was attainted of felony, but it was not for bribery, but being guilty of † being acceſſary to murder, for the which by the common law he was abjured the realm. * Plac. de parl. apud Aſhcrugg in Cro. Ep. anno 19 E. 1. Et Hollingſh. Chron. pag. 284, 285. he confeſſed felony, and abjured.

Likewiſe Adam de Stratton chief baron of the Exchequer a man of great poſſeſſions and riches was attainted of felony by him committed, all which I collect upon records of parliament the ſureſt guides. For in the parliament holden in 18 E. 1. in the ſame year when he was attainted, I find two petitions, one preferred by himſelf in theſe words, *Adam de Stratton petit gratiam regis, quòd reſtituatur ad aliquam partem terrarum ſuarum, et de bonis ſuis quæ habuit tempore quo fuit.** viz. 26000 li. [147] Rot. Parl. 18 E. 1. fo. 5. nu. 61. * There is a ſpace left in the record.

The other by Margaret de Boteler in theſe words, *Margareta quæ fuit uxor Joh. de Boteler, de qua Adam de Stratton tenuit 12 li. 10. s. in London, clamat habere ut eſchaet'. Reſponſſ. Rex non conceſſit; quia in civitate nulla eſt eſchaeta niſi regis.* And at the ſame parliament, fo. 3. it is reſolved, *non ſunt niſi tres formæ brevis de eſchaeta;* Et ibid. nu. 69.

eschaeta; *quia utlagatus, vel suspensus, vel abjuravit regnum.* And by consequence Adam de Stratton seeing his lands escheated, must have the judgement of one of these three. Which we have added to answer secret objections that might be made out of the mistakings of our Chronicles.

Rot. Parl. 20 E. 1. fol. 5.

The rest of the justices were removed, fined, and imprisoned, saving Johannes de Mettingham, and Elias de Beckingham, who to their eternall memory and honour were found upright, and free from all bribery and corruption.

10 R. 2. nu. 24.

It was petitioned in parliament, that the statutes whereby the justices of the one bench or the other should take no reward, ne be of any mans fee, may be observed. The kings answer was, [the king hath and will charge such justices to minister right, and will punish the contrary, and therefore willeth that all statutes made touching them and the barons of the exchequer, be made void.

(2) *When any man in judiciall place, &c.*] For the difference between bribery and extortion is, that bribery is only committed by him, that hath a judiciall place, and extortion may be committed both by him that hath a judiciall place, or by him that hath a ministeriall office.

Deut. 16. 19.

And this offence of bribery may be committed by any that hath any judiciall place either eccleasiasticall or temporall. *Non accipies personam nec munera*, (and the reason is expressed by the Holy Ghost) *quia munera excæcant oculos sapientum, et mutant verba justorum.*

If bribery hath so great force, as to blinde the eyes of the wise judge, and to change the words of the just, *Beatus ille, qui excutit manus suas ab omni munere. Judex debet habere duos sales; salem sapientiæ, ne sit insipidus, et salem conscientiæ, ne sit diabolus.*

Pasch. 17 E. 3. Coram rege. Rot. 139. Essex. John Berners case.

Though the bribe be small, yet the fault is great: and this appeareth by a record in the reign of E. 3. *Quia diversi justiciarii ad audiendum et terminandum assignat' ceperunt de Johanne Berners qui indictatus fuit, 4. li. pro favore habendo die deliberationis suæ, finem fecerunt domino regi per iiii M. marcas*, so as they paid for every pound a thousand marks. See before sir William Thorps case.

Rot. Parl. 7 R. 2. nu. 12, 13.

Rot. Parl. 7 R. 2. the chancellour was accused of a bribe of ten pound, and his man four pound and certain fish, which, though the things were small, yet it had been punished, if it had been proved.

Anno 18 E. 3.

(3) *Take any fee, robe, gift, or reward.*] This is warranted by the oath aboveasaid.

* Since these Institutes so was it resolved in the Star-chamber, Trin. 6 Car. Reg. in an information against Bonham Norton and others.

But admit the party * offereth a bribe to the judge, meaning to corrupt him in the cause depending before him, and the judge taketh it not, yet this is an offence punishable by law in the party that doth offer it.

(4) *Brocage.*] There is good warrant for this word by the said act of 11 H. 4.

(5) *Of any person that hath to doe before him any way.*] This hath his ground upon the oath aforesaid, so as bribery may be committed not only when a suit dependeth *in foro contentioso* (as it was in the case of sir Fr. Bacon lo. of S. Alban lo. chancellour of England, who for many exorbitant and fordid briberies was sentenced by the lords of parliament, which you may reade Rot. Parl. *anno* 19 *Jacobis regis*) but also when any in judiciall place doth any thing *virtute* or *colore officii*, though there be no suit at all. For example, if the

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the lord treaſurer for any gift or brocage, ſhall make any cuſtomer, controller, or any officer or miniſter of the king, this is bribery, for he ought to take nothing in that caſe by the ſtatute of 12 R. 2. but that he make all ſuch officers and miniſters of the beſt, and moſt lawfull men, and ſufficient for their eſtimation and knowledge. (An excellent law tending greatly to his majeſties advantage, to the good uſage and encouragement of merchants, &c. and generally to the advancement of commerce, trade, and traffique, the life of this iſland.) Reade this ſtatute, for it is of a large extent, and the ſtatute of 5 E. 6. for they are laws made *contra ambitum*, and worthy to be put in execution, for they prevent bribery and extortion; for they that buy will ſell.

2 R. 2. ca. 2. See the ſtatute of 5 E. 6. ca. 16.

Vendit Alexander claves, altaria ſacra:
Vendere jure poteſt, emerat ille prius.

And that the ſtatute of 5 E. 6. doth extend as well to eccleſiaſticall offices, as temporall, which concern the adminiſtration and execution of juſtice. And it was reſolved in the caſe of doctor Trever chancellour of a biſhop in Wales, that both the office of chancellour and regiſter of the biſhop are within that ſtatute, becauſe they concern the adminiſtration of juſtice.

Hil. 8 Ja. in communi banco D. Trevers caſe. See hereafter ca. of Simony, and the 1. part. of the Inſtit. ſect. 378. fo. 234.

* L. Earl of M. lord treaſurer of England took *colore officii* divers bribes, &c. And namely where the farmers of the cuſtomes exhibited a petition to have certain juſt allowances, which his majeſty referred to the ſaid lord treaſurer, who long delayed the petitioners, untill they gave him ſeverall bribes, and then he gave way to relieve them. For this, and other his briberies, extortions, oppreſſions, and other grievous miſdemeanours in his ſeverall offices of the lord treaſurer, and maſter of the court of wards (no ſuit being in any of thoſe caſes depending) upon complaint, and charge of the commons in this parliament, and after evident proof and often hearing of the cauſe, the lords of parliament (the lord treaſurer being brought to the bar by the gentleman uſher and ſerjeant at arms, and kneeling till he was commanded to ſtand up) upon the petition of the commons by the ſpeaker gave this judgment againſt him by the mouth of the lord keeper in theſe words. This high court of parliament doth adjudge. Firſt, that you L. Earl of M. now lord Treaſurer of England ſhall loſe all your offices which you hold in this kingdome. 2. And ſhall be for ever uncapable of any office, place, or imployment in this ſtate and common-wealth. 3. And that you ſhall be impriſoned in the tower of London during the kings pleaſure. 4. And that you ſhall pay to our ſoveraign the king the fine of 50000. li. 5. And that you ſhall never ſit in parliament any more. 6. And that you ſhall never come within the verge of the kings court, as by the ſaid roll of the parliament appeareth, which is worthy of your reading at large.

* Rot. Parl. 21 Ja. regis.

In *anno* 21 H. 8. by articles under the hands of all the lords of the privy councell, (whereof ſir Thomas Moor then lord chancellour was one) and of the principall judges of the realm, which I have ſeene, cardinall Woolſey was charged with divers briberies, namely in the eighteenth article, in theſe words. Alſo the ſaid lord cardinall conſtrained all ordinaries in England, yearly to compound with him, or elſe he would uſurp half, or the whole of their juriſdiction by prevention, not for good order of the dioces, but to extort treaſure: for there is never a poor archdeacon in

Anno 21 H. 8. Artic. 18.

in England but that he paid to him a yeerly portion of his living.

21 H. 8. ca. 5. Vide 2 R. 2. Rot. Parl. nu. 46.

If any ordinary, &c. having power by the act of 21 H. 8. to grant the administration of the goods of him that dieth intestate, or as intestate, to the widow or next of kin, &c. take any reward for preferring of any person, before another, to the administration, it is bribery.

[149] The law before the conquest. Inter leges Canuti, cap. 13.

Si quis contra fas et leges administrarit, vel pro odio, quod in alium habuerit, judicaverit perperam, aut denique nummarium se judicem præbuerit, proprii capitis æstimatione Anglorum jure regi damnatur, nisi quidem legum id accidisse insciti, &c.

CAP. LXIX.

Of Extortion, Exaction, &c.

THIS is another great [a] misprision because it is accompanied with perjury. Hereof you may read in the first part of the Institutes, sect. 701. See also in the second part of the Institutes, W. 1. cap. 26. and cap. 10. And in the fourth part of the Institutes, cap. Chancery, in the articles against cardinall Woolsey, article 3. Extortion of Ordinaries. [b] *Ranusiatores hominum, extortionatores hominum:* a rancunnier, an extortioner of men.

[a] Lib. 10. fo. 101. & 102. Beawfages case. See the 1. part of the Institutes sect. 701. verb. [Extortioners] 2. part of the Instit. W. 1. ca. 26. The 4. part of the Institutes, ca. Chancery in the articles against Cardinall Woolsey, art. 3.

[b] Trin. 28 E. 3. Coram rege. Rot. 37 Eborum.

[c] The collectors of the fifteens were committed to prison, for that they took of every town eighteen pence for an acquittance.

[c] Hil. 20 E. 3. Coram rege. Rot. 159. Norff.

[d] A coroner was committed to prison, because he would not take the view of the dead body, before he had received for himself six shillings eight pence, and for his clerk two shillings, and was fined at forty shillings.

[d] Ibidem in the same roll.

[e] If any of the kings councell or his ministers doe exact a bond of any of his subjects, to come to the king with force and arms, &c. when they should be sent for, such writings are to the kings dishonour; for that every man is bound to do to the king as to his liege lord, [f] al that appertaineth to him, without any manner of writing, (note the generality hereof) and such writings are to be cancelled, as by the act appeareth.

[e] 1 E. 3. stat. 2. ca. 15.

[f] Nota.

Hereupon (by authority of this parliament) these conclusions doe follow. First, whatsoever any subject is bound to doe to the king, as to his liege lord, no bond or writing is to be exacted of the subject for doing thereof. Secondly, whatsoever bonds or writings are to the kings dishonour, are against law. Thirdly, whether such bonds or writings be made to the king or any other, the bonds or writings be void.

[g] If a bishop or other ecclesiasticall judge, or minister, doth exact a bond or oath of any person in any case ecclesiasticall, not warrantable by law, the bond is void, and this exaction is punishable by fine, &c. the record is very long, but worthy to be read. See Rot. Parl. *anno* 8 H. 4. nu. 15, 16, 17, 18, 19, 20. excellent matter

[g] Int. Inquisit. apud Lancestron Coram Johanne Loveday, and Waltero de Wynbern, an. 6 E. 1. Cornub.

matter concerning fees in courts of juſtice, and in the kings houſhold.

[h] *Officialis indictatus de citando, et affligendo plurimos, non poteſt dedicere, et petit quod admittatur ad finem.*

[i] *Contra ſequeſtratores, commiſſarios, et alios offic' epiſcoporum pro captione feodorum, priuſquam debent pro teſtamentis probandis.*

[k] The extortion of the clergy, and of their miniſters to be enquired of by juſtices of peace.

Reſolutions upon the ſtatute of 21 H. 8. ca. 5.

[l] If a man makes his teſtament in paper, and dieth poſſeſſed of goods and chattels above the value of forty pound, and the executor cauſeth the teſtament to be tranſcribed in parchment, and bringeth both to the ordinary, &c. to be proved: it is at the election of the ordinary whether he will put the ſeal and probate to the originall in paper, or to the tranſcript in parchment: but whether he put them to the one or the other, there can be taken of the executor, &c. in the whole but five ſhillings, and not above, viz. two ſhillings ſix pence to the ordinary, &c. and his miniſters, and two ſhillings ſix pence to the ſcribe for * regiſtring the ſame: or elſe the ſaid ſcribe to be at his liberty, to refuſe thoſe two ſhillings and ſix pence, and to have for writing every ten lines of the ſame teſtament, whereof every line to contain ten inches, one penny.

If the executor deſire that the teſtament in paper may be tranſcripted in parchment, he muſt agree with the party for the tranſcripting; but the ordinary, &c. can take nothing for it, nor for the examination of the tranſcript with the originall, but only two ſhillings ſix pence for the whole duty belonging to him. Where the goods of the dead doe not exceed an hundred ſhillings, the ordinary, &c. ſhall take nothing, and the ſcribe to have only for writing of the probate ſix pence, ſo the ſaid teſtament be exhibited in writing with wax thereunto affixed ready to be ſealed. Where the goods of the dead doe amount to above the value of an hundred ſhillings, and doe not exceed the ſumme of forty pound, there ſhall be taken for the whole but three ſhillings ſix pence, whereof to the ordinary, &c. two ſhillings ſix pence, and twelve pence to the ſcribe for regiſtring the ſame. Where by cuſtome leſſe hath been taken in any of the caſes aforeſaid, there leſſe is to be taken. And where any perſon requires a copy, or copies of the teſtament ſo proved, or inventory ſo made, the ordinary, &c. ſhall take for the ſearch, and making of the copy of the teſtament or inventory, if the goods exceed not an hundred ſhillings, ſix pence, and if the goods exceed an hundred ſhillings, and exceed not forty pound, twelve pence. And if the goods exceed forty pound, two ſhillings ſix pence, or to take for every ten lines thereof of the proportion before rehearſed, a penny.

When the party dies inteſtate, the ordinary may diſpoſe ſomewhat in pious uſes, notwithſtanding the ſaid act of 31 E. 3. but with theſe cautions, 1. That it be after the adminiſtration granted, and inventory made, ſo as the ſtate of the inteſtate may be known, and thereby the ſum may appear to be competent. 2. The adminiſtrator muſt be called to it. 3. The uſe muſt be publique and godly. 4. It muſt be expreſſed in particular. And, 5. There muſt be a decree made of it, and entred of record: ſo in caſe of

[h] Mich. 22 E. 3. Coram rege Rot. 181. Eborum.

[i] Hil. 23 E. 3. Coram rege.

[k] Rot. Parl. 3 R. 2. nu. 38, 39. 1 H. 5. nu. 23, 24.

[l] Mich. 6. Jacobi Rot. 1301 in communi banco. int. Edm. Neale informer, &c. et Jacobū Rowſe official' infra Archidiaconat' de Huntindon defendant per le chief juſtice Walmeſly, Warburton, Daniell, and Foſter.

* [150] For puniſhment of eccleſiaſticall judges for extortion. See Rot. de Inquiſit. in Com. Eborum, Somerſet, &c. anno 4 E. 1. in Theſauro. De judicibus eccleſiaſticis dicunt, &c. Rot. Parl. 8 E. 3. nu. 9. The ſtatute of 31 E. 3. cap. 4. Paſch. 32 E. 3. Coram rege. Rot. 27. Rot. Parl. 50 E. 3. nu. 9. 1 R. 2. nu. 109. 2 R. 2. nu. 40. 13 R. 2. nu. 38, 39. 7 R. 2. nu. 53. The ſtatute of 3 H. 5. ca. 4. Mich. 20 Jacobi in Camera Stellata, in Sir Jo. Benaets caſe.

commutation of penance, it muſt be after ſentence, and *mutatis mutandis, ut ſupra.*

2 H. 4. ca. 10. Whereas twenty, forty, or an hundred be indicted of one felony, or one treſpaſſe, and all plead to an iſſue, as not guilty, the clerk of the crown of the kings bench, ought not to take for the *venire facias*, or for the entring of the plea, above two ſhillings, but the ſaid clerk did take for every ſuch name by extortion two ſhillings. It is ordained and eſtabliſhed, that the ſaid clerk of the crown, ſhall take no more then hath been duly uſed of old time. And moreover our ſoveraign lord the king hath charged the ſaid juſtices of the kings bench, that no extortion be done in this behalf in the bench aforeſaid.

2 H. 4. ca. 8. The chirographer of the king in the common bench for making and writing of every fine levied four ſhillings, and no more, upon pain (if he take more) to loſe his office, be expelled the court, one years impriſonment, and to pay to the party grieved his treble damages.

2 H. 4. ca. 23. The fees to the marſhall of the marſhalſea of the kings houſe, you may read in the ſtatute of 2 H. 4. Vide 9 R. 2. cap. 5.

33 H. 8. ca. 39. If any auditor of the exchequer, dutchy of Lanc', or court of wards take more then three ſhillings four pence, for the enrolment of any letters patents, decree, grant, or indenture of leaſe, he ſhall forfeit, for every penny ſo taken, ſix ſhillings eight pence.

Munera ne capias, uncus latet hamus in eſca:
Nulla carent viſco munera, virus habent.

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CAP. LXX.

OF USURY.

37 H. 8. ca. 9. 13 Eliz. ca. 8. USURY is a contract upon the lone of money, or giving dayes for forbearing of money, debt, or duty, by way of lone, chiviſance, ſhifts, ſales of wares, or other doings whatſoever. *Uſura dicitur ab uſu et ære, quia datur pro uſu æris:* or *uſura dicitur, quaſi ignis urens.*

Deut. cap. 21. Exo. 22. Levit. 25. Ezech. 2. Pſal. 15. And firſt, uſury is directly againſt the law of God. And the reaſon wherefore it was permitted by the law of God for an Hebrew to an infidell, was; becauſe it was a mean either to exterminate, or to depauperate them, as they ſhould not be able to invade, or injure Gods people.

c 13 Eliz. cap. 8. 21 Jac. cap. 17. c And it is adjudged by authority of parliament, that all uſury being forbidden by the law of God, is ſinne, and deteſtable. And it is alſo enacted by parliament, that all uſury is unlawfull, that is to ſay, againſt the lawes of the realme. Let us therefore ſee what former laws have provided herein.

d See the Cuſt. de Norm. cap. 20. Int. leges S. Edw. d *Siquis de uſura convictus fuerit, omnes res ſuas amittat.*

e Glanvil. lib. 7. cap. 16. e *Uſurarii omnes res, ſive teſtatus, ſive inteſtatus deceſſerit, domini regis ſunt: vivus autem non ſolet aliquis de crimine uſuræ appellari, nec convinci, ſed inter cæteras regias inquiſitiones ſolet inquiri, et probari aliquē in tali crimine deceſſiſſe per 12 legales homines de viceneto et per eorum*

eorum sacramentum. Quo probato in curia, omnes res mobiles, et omnia catalla, quæ fuerunt ipsius usurarii mortui, ad usus domini regis capientur, penes quemcurq; inveniantur res illæ. Hæres quoq; ipsius, hac eadem de causa exhæredatur secundum jus regni; et ad dominum, vel dominos revertetur hæreditas. Sciendum tamen, quod si quis aliquo tempore usurarius fuerit in vita sua, et super hoc in patria publice defamatus, si tamen à delicto ipso ante mortem suam destiterit, et pœnitentiam egerit; post mortem ipsius, ille, vel res ejus lege usurarii minime censebuntur. Oportet ergo constare quòd usurarius decesserit aliquis ad hoc, ut de eo tanquam de usurario post mortem ipsius judicetur, et de rebus ipsius, tanquam de rebus usurarii disponatur.

Vide lestatute de Merton, cap. 5. et Fleta, lib. 2. ca. 50. [f] *Manifestus usurarius est intestabilis.*

[g] *Et inter les constitutions ordeins p. les viels reyes Alfred, &c. ordeine fuit que les chattels des usurers fuissent al rey, et que les heritages des usurers remeissent escheats al seigniors des fees, et ne ser' interre in sanctuary.*

[h] *Item, atrox injuria est, quæ omnium mobilium amissionem confert et legem liberam aufert, quæ locum habet in usurariis Christianis.*

[i] *Ad 16 Artic. de usuris respondetur: quod licet episcopis pro peccato illo pœnitentiam usurario injungere salutarem. Sed quia committendo usuram, usurarius furtum committit, et super hoc est convictus, catalla et tre' usurarii, sicut catalla furis, sunt regis, et si qui sequi voluerint contra hujusmodi usurarium, restituantur eis bona sua, quæ ipsi usurarii per usuram extorserunt.*

Merton cap. 5.

[f] Fleta, lib. 2. cap. 50.

[g] Mirror, cap. 1. § 3. & cap. 5. §. 1. Parl. 50 E. 3. nu. 58.

[h] Fleta, lib. 2. c. 1.

[i] Rot. Parliam. 51 H. 3. Petitiones cleri.

[k] And it appeareth by Bracton, that it was an article of the charge of inquiry by justices in eire *de usurariis Christianis mortuis, qui fuerunt, et quæ catalla habuerunt, et quis ea habuerit. Et quòd nullas recipiet usuram ante vel ingenio.* And divers were indicted for taking of usury before justices in eire, and some were pardoned by the king, and others not:

In ancient time a great revenue by reason of the usury of the Jewes came to the crown: for between the 50 year of H. 3. and the 2 yeare of E. 1. which was not above seven yeares compleat, there was paid into the kings coffers four hundred and twenty thousand pounds of and for the usury of the Jews. And yet that excellent king for divers weighty seasons worthy to be written in letters of gold, did by authority of parliament utterly prohibit the same, in these words. Forasmuch as the king hath perceived that many evils and dishersons of the good men of his land had come to passe by the usuries which the Jews have done in times past, and that many sins and offences have risen thereupon: albeit he and his auncesters have had great profit thereby of the Jews; notwithstanding for the honour of God, and for the common profit of his people, the king hath ordained, and established, that no Jew shall take usury, &c. Before this time Jews were divers times banished this realm, but still they returned again. But this wise and worthy king by authority of parliament banishing their usury, put the Jews into perpetuall exile into forain countries, where usury was tolerated. By which act it appeareth that the suppression of usury tendeth to the honour of God, and the common profit of the people.

By which authorities and records, and by many others that might be remembred, it appeareth that by the ancient laws of this realm usury was unlawfull, and punishable, although the punish-

[k] Bract. lib. 3. fo. 116, 117. Fleta, lib. 2. ca. 1. Cap. itineris. vet. Mag. Cart. par. 1. fo. 151. Rot. pat. 3 E. 1. m. 10. 19, 20, 21, 22. 36 Rot. clauf 2 E. 1. m. 1.

[l] Rot. pat. 3 E. 1. nu. 14. 17. 26. Willielm. Middleton reddit compotum.

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Vet. Mag. Cart. 2. part, fo. 58. 59. Stat. de Judaismo. See the 2. part of the Institutes, stat. de Judaismo and the Exposition upon the same.

ment was not always one, but ſometime greater, and ſometime leſſer: and therefore at the parliament holden in the fifteenth year of E. 3. It was enacted, and declared, according as it had been ſometime holden, that the king and his heirs ſhould have conuſance of uſurers after their death, and that the ordinary of holy church ſhould have conuſance of uſurers alive, for as much as to them it appertains, to compell them by the cenſures of holy church, for the ſin, to make reſtitution of uſuries taken againſt the law of holy church. But this ſtatute was afterward repealed, as hereafter ſhall appear.

15 E. 3. ca. 5.

Johannes Hopd convictus per juratores pro uſura capiend' 11 s. 8 d. pro 20 s. præſtand', et ſic de ſimilibus.

Hil. 6 E. 3. Coram rege rot. 130. Norff.

Many of the citizens of London giving over trade and traffick (which is the life of the common-wealth, and ſpecially of an iland) and betaking themſelves to live upon uſury, Sir William Walworth being lord maior, by the advice of the aldermen his brethren, took ſuch good and ſtrict order for the execution of laws, and for ſuppreſſion of uſury within the city of London, as the commons in parliament put up a petition to the king in theſe words, [That the order that was made in London againſt the horrible vice of uſury, might be obſerved throughout the whole realm] whereunto the king anſwered; that the old law ſhould continue.

Vide 26 E. 3. fo. 71. Moignes caſe.

Rot. Parl. 50 E. 3. nu. 158. Vide Rot. Parl. 6 R. 2. nu. 57. 14 R. 2. nu. 24.

After this Sir John Northampton, maior of the city of London, by the advice of the aldermen his brethren, took more ſtrict order for the ſuppreſſion of unlawfull uſury within the city of London: which had ſo good ſucceſſe, as the commons in parliament petitioned the king in theſe words. The commons pray, that againſt the horrible vice of uſury (then tearmed ſcheſes) and practiſed as well by the clergy as laity, the order made by John Northampton late maior of London, may be executed through the realm. Whereunto the king anſwered, The king willeth thoſe ordinances to be viewed, and if they be found to be neceſſary, that the ſame be then affirmed. And here it is to be obſerved, that of ancient time the notable merchants of London deteſted uſury, and dry exchange.

Rot. Parl. 14 R. 2. nu. 14.

3 H. 7. ca. 5. 6. 11 H. 7. ca. 8. Vide 5 E. 6. c. 20.

By the ſtatutes of 3 H. 7. and 11 H. 7. all uſury is damned and prohibited, and there it is called dry exchange. So as uſury is not only againſt the law of God, and the laws of the realm, but againſt the law of nature: *Uſura contra naturam eſt, quia uſura ſua natura eſt ſterilis, nec fructum habet.*

27 H. 8. ca. 9. 13 Eliz. ca. 8. 21 Jac. ca. 17.

But now by the ſtatutes of 37 H. 8. and 13 Eliz. all former acts, ſtatutes, and laws ordained and made, for the avoiding or puniſhment of uſury are made void, and of none effect. So as at this day, neither the common law, nor any ſtatute is in force, but only the ſtatutes of 37 H. 8. 13 Eliz. and 21 Jac. And the eccleſiaſticall juriſdiction is ſaved by the ſaid ſtatute of 13 Eliz. as thereby it appeareth. For the expoſition of which ſtatutes of 37 H. 8. and 13 El. ſee in my Reports, viz. lib. 3. fo. 80, 81. lib. 5. fo. 69, 70. lib. 9. 26.

CAP.

CAP. LXXI.

Of Simony and corrupt Preſentations.

SIMONY. *Simonia eſt vox eccleſiaſtica, à Simone illo Mago deducta, qui donum ſpiritus ſancti pecuniis emi putavit.*

Againſt ſimony, &c. the ſtatute of 31 Eliz. is made in theſe words.

Simony deſcribed by the act following.

Stat. de 31 Eliz. cap. 6.

Be it enacted that if any perſon or perſons, bodies politique or corporate, ſhall or doe for any ſumm of mony, reward, gift, profit or beneſit, directly, or indirectly, or for, or by reaſon of any promiſe, agreement, grant, bond, covenant, or other aſſurance, of or for any ſumm of money, reward, gift, profit or benefit whatſoever, directly, or indirectly, preſent, or collate (1) any perſon to any benefice with cure of ſoules, dignity, prebend, or living eccleſiaſticall; or give, or beſtow the ſame for, or in reſpect of any ſuch cauſe or conſideration: * That then every ſuch preſentment, collation, gift, and beſtowing, and every admiſſion, inſtitution, inveſtiture, and induction thereupon ſhall bee utterly voyde, fruſtrate, and of none effect (2) in law; and that it ſhall, and may be lawfull to and for the queenes majeſtie, her heires and ſucceſſors, to preſent, collate unto, or give, or beſtow every ſuch benefice, dignity, prebend and living eccleſiaſticall for that one time, or turne onely, and that all and every perſon and perſons, bodies politique and corporate, that ſhall give or take any ſuch ſumm of mony, reward, &c. ſhall forfeit and loſe the double value of one yeares profit (3) of every ſuch benefice, dignity, prebend and living eccleſiaſticall. And the perſon ſo corruptly taking, procuring, ſeeking, or accepting any ſuch benefice, dignity, prebend, or living, ſhall thereupon, and from thenceforth be adjudged a diſabled perſon in law (4) to have, or enjoy the ſame benefice, dignity, prebend, or living eccleſiaſticall.

See the 2. part of the Inſtit in the expoſition of the ſaid act of 31 El. *Injuſtum eſt illa vendere quæ gratis diſtribui debent.* vide Matth. ca. 10. ver. 8.

* Nota, the ſtatute doth not make the bond, promiſe, covenant, or other aſſurance void, but the preſentment, &c. and ſo it was adjudged, Paſch. 40 Eliz. Rot. 1745, in communi banco, between Gregory plaintif and Oldbury defendant. Nota differentiam inter malum in ſe againſt the common law, et malum pronibitum by ſtatute law; et malum in ſe againſt the common law, and malum prohibitum by the civill or canon law; whereof the judges of the common law in theſe caſes take no notice.

This is the text of this part of the act, now let us proceed to the expoſition hereof, being a neceſſary law to be put in execution.

(1) *Preſent or collate.*] This is not onely intended, where the perſon preſenting or collating hath right to preſent, or collate; but alſo where any perſon or perſons, bodies politique and corporate, doe uſury, and have no title to preſent or collate. And ſo it was adjudged in caſe where the uſurpation was to a church of the king.

Mic. 13. Ja. in quare impedit betweene the

king and the b. of Norwich. Tho. Cole and Robert Secker, which began Pasch. 13 Jac. Rot. 21. for the vicarage of Haverell in Suffolk.

Sed quando præsentatio et jus patronatus sunt temporalia, quæritur quomodo fit simonia per donum pecuniæ pro illis: respondendum est quod jus patronatus et presentatio dicuntur spiritualia, respectu rei, ad quam præsentatur, quæ spiritualis est. Vide Linwood cap. de Jurejurando, fo. 80.

(2) *Shall be utterly voide and of none effect.*] But here is to be observed a diversity between a presentation, or collation made by a rightfull patron, and an usurper. For in case of a rightfull patron, which doth corruptly present, or collate, by the expresse letter of this act the king shall present: but where one doth usurp, and corruptly present or collate, there the king shall not present, but the rightfull patron: for the branch that gives the king power to present, is onely intended, where the rightfull patron is in fault, but where the rightfull patron is in no fault, there the corrupt act, and wrong of the usurper maketh the benefice, &c. voide, but taketh not away the lawfull title to present from the rightfull patron, and so it was adjudged in the case aboveſaid.

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Mich. 13 Jac. ubi supra.

Also upon these words, [If any patron without the notice of the person so presented, or collated, doth take reward, &c.] yet by the expresse letter of this branch the church, &c. is voide, for both the letter and intention of this act is to make the admission, institution, and induction of any presentee, that commeth in by a corrupt patron voide. And so was it resolved in the case aboveſaid, as it hath been formerly adjudged in the common place. But where the presentee is not privy, nor consenting to any such corrupt contract, as is prohibited by this act, because it is no simony in him, there the presentee shall not be adjudged a disabled person within this act: for the words of that branch be, And the person so corruptly giving, &c. so as he shall not be disabled, unlesse he be privy to the corrupt contract: and upon the severall penning of these severall branches, the diversity aboveſaid was resolved Mich. 13 Jac. *ubi supra.*

Mich. 41 & 42 El. in Communi banco between Baker and Rogers.

24 E. 3. fo. 35. 38 E. 3. 3. 7 Eliz. Dier 257.

(3) *Shall forfeit and lose the double value of one yeares profit.*] This double value shall be accounted according to the very, or true value, as the same may be letten, and shall be tryed by a jury, and not according to the extent, or taxation of the church: whereof one was made both of the spiritualties and temporalties in 20 E. 1. 1292. in the time of pope Nicholas: of that *vide* 11 H. 4. fo. 35. E. N. B. 176. and Polichron, lib. 7. cap. 38. Rot. Parl. 18 E. 3. nu. 44. sta. 2. 1 R. 2. nu. 102. 8 H. 6. nu. 15. And the other taxation was made in 26 H. 8.

(4) *Be adjudged a disabled person in law.*] It was resolved in the case of Mich. 13 Jac. *ubi supra*, that the king could not dispense with this disability by a *non obstante*: for when an act of parliament is made that disableth any person, or maketh any thing void, or tortious for the good of the church, or common-wealth, in this law all the kings subjects have an interest, and therefore the king cannot dispence therewith no more then with the common law. But where a statute prohibiteth any thing upon a penalty, and giveth the penalty to the king, or to the king and informer, there the king may dispense with the penalty, and this diversity is warranted by our books.

5 E. 3. 29. 11 H. 4. 76. 2 H. 7. 6 11 H. 7. 11. 13 H. 7.

8. b. 27 H. 8. F. N. B. 211. b. Placita com. 502.

King

* King James referred this caſe unto Sir Thomas Egerton lord chancellor of England, and to the chiefe juſtice of the kings bench. Sir Robert Vernon being coferer of the kings houſe, by reaſon of which office, he hath the receipt and payment of 40,000 li. of the kings treaſure yearely, and payeth the wages beneath the ſtayres, &c. did bargaine and ſell the ſaid office for a great ſumm of money, and for certaine annuities to be paid, to Sir Arthur Ingram knight. The firſt queſtion was whether the ſaid office were void by force of the ſtatute of 5 E. 6. ca 16. The ſecond was, ſeeing the words of this act be [ſhall be adjudged a diſabled perſon in law, to all intents and purpoſes to have and occupy any ſuch office, &c.] whether the king might diſpenſe with that [diſabled] and upon mature deliberation and hearing of counſell learned, they reſolved, and ſo certified the king, that the ſaid office was void by the ſaid bargaine and ſale, and that the king could not diſpenſe with the ſaid diſability, for the reaſon and cauſe above ſaid; and thereupon Sir Marmaduke Darrell was preferred to that office.

* Anno 12 Jac. regis Sir Arthur Ingrams caſe upon the ſtatute of 5 E. 6. cap. 16.

Likewiſe by the ſtatute of 5 Eliz. every perſon which ſhall be elected a knight, citizen, burges, or baron of the cinque ports for any parliament, before he ſhall enter into the parliament houſe, ſhall take the oath of ſupremacy appointed by the act of 1 Eliz. and that he that entreth into the parliament without taking the ſaid oath, ſhall be deemed no knight, citizen, burges, or baron, nor ſhall have any voice, but ſhall be, as if he had been never returned, or elected. Here be words that amount to a diſability, and therefore that according to the former reſolutions the king cannot diſpenſe with the ſame.

5 Eliz. cap. 1.

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It is further enacted, that if any perſon ſhall for any ſum of money, reward, &c. *(ut ſupra)* other then for uſuall fees, admit, inſtitute, inſtall, induct, inveſt, or place any perſon in or to any benefice with cure of ſouls, dignity, prebend, or other living eccleſiaſticall: that then every perſon ſo offending ſhall forfeit and loſe double value, *ut ſupra*; and that thereupon immediately from and after the inveſting, inſtallation, or induction thereof had, the ſame benefice, &c. ſhall be eftſoons meerely void, &c.

The reaſon of this clauſe (for I was of this parliament, and obſerved the proceedings therein) was to avoid haſty and precipitate admiſſions, inſtitutions, &c. to the prejudice of them that had right to preſent, by putting them to a *quare impedit*, and no ſuch haſt or precipitation is uſed, but for reward, &c. as it is to be preſumed.

There be two great enemies to juſtice and right, viz. *præcipitatio, et moroſa cunctatio.*

And albeit the church is full by the inſtitution, &c. againſt all, but the king, yet the church becommeth not void by this branch of this act, untill after induction.

And that the patron, &c. ſhall and may preſent, &c.] This is intended of the rightfull patron, or of him that hath right to preſent.

Vid. 14 H. 4. 19.

And be it further enacted, that if any incumbent of any benefice with cure of ſoules ſhall corruptly reſigne, or exchange the ſame, or corruptly take for or in reſpect of the reſigning or exchanging of the ſame, directly or indirectly, any penſion, ſum of mony, or benefit whatſoever: That then as well the giver as the taker, &c. ſhall loſe double the value of the money ſo given, and double the value of one years profit.

By another branch of this act it is provided,

That if any perſon or perſons ſhall or doe receive, or take any money, reward, &c. *ut ſupra*, (ordinary and lawfull fees only excepted) for or to procure the ordaining or making of any miniſter, or giving any orders, or licence to preach, ſhall for every offence forfeit and loſe the ſumme of forty pound, and the party ſo corruptly made miniſter, ſhall forfeit and loſe the ſum of ten pound, and if at any time within ſeven years after ſuch corrupt entring into the miniſtry, he ſhall accept or take any benefice, living, or promotion eccleſiaſticall, that then immediately, from and after the induction, inveſting, or inſtallation thereof, or thereunto had, the ſame benefice, living, and promotion eccleſiaſticall ſhall be eſtſoons meerly void, &c.

33 E. 1. tit. Annuity 51. Vid. Canon 40. 1 Jacobi 1603. the oath againſt ſimony, &c. * 9 E. 3. 22. 10 E. 3. 1. 29 E. 3. 44. Regiſt. 58. 21 H. 8 ca. 13. verſ. finem.

Take a benefice.] This word *beneficium eccleſiaſticum* extendeth not only to benefices of churches parochiall; but to dignities and other eccleſiaſticall promotions; as to deaneries, archdeaconries, prebends, &c. And it appeareth in our * books that deaneries, archdeaconries, prebends, &c. are benefices with cure of ſouls; but they are not comprehended under the name of benefices with cure of ſouls within the ſtatute of 21 H. 8. by reaſon of a ſpeciall proviſo; which they had been, if no ſuch proviſo had been added, viz. deans, archdeacons, chancellours, treaſurers, chanters, prebend, or a parſon where there is a vicar indowed.

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If any perſon or perſons, bodies politique or corporate, which have election, nomination, voice, or aſſent in the choice, election, preſentation, or nomination of any ſcholar, fellow or any other perſon to have room, or place in any church collegiat or cathedrall, colleges, ſchools, hoſpitals, halls, or ſocieties, ſhall take or receive any money, fee, or reward, &c. the place, room, office, &c. of the offender ſhall be void, &c.

Like caſes in Pl. com. 176. upon the ſtatute of 32 H. 8. of Cond. Dier, 20 Eliz. upon the ſtatute of 27 H. 8. Of Uſes.

Which have election, preſentation, &c.] This act being a law perpetuall, theſe words extend not only to ſuch perſon and perſons, &c. as at that time had election, preſentation, &c. but to all and every perſon and perſons, that at any time hereafter ſhould have election, preſentation, &c. otherwiſe the law ſhould be but temporary, which ſhould be directly againſt the meaning of the makers of the act. And by the ſame reaſon this act extendeth not only to churches,

churches, colledges, ſchools, hoſpitals, hals, and ſocieties founded at the time of the making of the act, but to all ſuch as ſhould be erected or founded after.

And if any fellow, officer, or ſcholar in any of the churches, colleges, &c. *ut ſupra*, contract or agree for any money, reward, &c. for the leaving, or reſigning up of the ſame his room or place to any other, &c. ſhall forfeit and loſe double the ſum of money, &c. ſo received, and every perſon by whom or for whom any money, &c. ſhall be given, &c. ſhall be incapable of that place or room for that time or turn, &c. And it is further enacted, that at the time of every ſuch election, preſentation or nomination, as well this preſent act, as the orders, and ſtatutes of the ſame places concerning ſuch election, preſentation or nomination ſhall then and there be publiquely read, upon pain to forfeit and loſe the ſum of forty pound, &c. whereof, the one moiety to him that will ſue, and the other moiety to the church, colledge, &c.

I have read ancient verſes concerning ſimony, and other corrupt entries into churches, which are not unneceſſary, in deteſtation of them, to remember.

Quatuor eccleſias portis intratur in omnes,
Cæſaris et ſimonis, ſanguinis, atque Dei.
Prima patet magnis, nummo patet altera, charis
Tertia, ſed paucis quarta patere ſolet.

Four doors hath every church, and all but one forebod,
(Whereof unſeen ſome may be peradventure)
Of Ceſar, ſimonie, of kindred, and of God:
And each church man by one of theſe doth enter.
Great mens command doth open wide the firſt,
At next by money enter many one,
The third to weak allies, but (for the church the worſt),
Gods dore doth open to a few or none,

To conclude this chapter with this, that ſimony is odious in the eye of the common law: for a garden in ſocage of a mannor, whereunto an advowſon is appendant, ſhall not preſent to the church, becauſe he can take nothing for the preſentation, for the which he may account to the heir; and therefore the heir in that caſe ſhall preſent of what age ſoever. And if an heir of tenant *in capite*, hath livery *cum exitubus*, yet ſhall the heir not preſent to an advowſon, becauſe no iſſues or profit can be taken thereof.

* *Latro eſt qui aurum ex religione ſectatur.*

And the common law would have the patron ſo far from ſimony, as it denied him to recover damages in a *quare impedit*, or aſſiſe of *darrein preſentment*, before the ſtatute of W. 2. cap. 5.

[a] Simony is the more odious, becauſe it is ever accompanied with perjury, for the preſentee, &c. is ſworn to commit no ſimony.

7 E. 3. 39. 2. 27 E. 3. 89. 29 E. 3. Preſent. al egliſe. Fitz. 17. 8 E. 2. Preſent. 10. Fitz. N B. 33. S. 24 E. 3. 29.

* *Jerome.*

3 H. 6. tit. Damages. 17 adjudge. See the 2. pt. of the Inſtit. W. 2. ca. 5. Lib. 6. fo. 50. & 51. Lib. 5. 58, 59. Speccot.

[a] Vid. Linwood ubi ſupra.

CAP. LXXII.

Of Monomachia, Single Combate, Duell, Affrays, and Challenges, and of Private Revenge.

THIS ſingle combat between any of the kings ſubjects, of their own heads, and for private malice, or diſpleaſure is prohibited by the laws of this realm: for in a ſetled ſtate governed by law, no man for any injury whatſoever, ought to uſe private revenge; for revenge belongeth to the magiſtrate, who is Gods lieutenant. And the law herein is grounded upon the law of God. *Vindicta eſt mihi, et ego retribuam, dicit Dominus.* Vengeance is mine, and I will repay it, ſaith the Lord. *Qui vindicari vult, inveniet vindictam à domino, et peccata illius ſervans ſervabit.* He that will revenge, ſhall finde vengeance from the lord, and he will ſurely keep his ſins in remembrance.

Deut. 32. 35. Rom. 12. 19. Eccleſiaſticus 28. 1. Gen. 34. ver. 25. & 30. of Simeon and Levi.

It is alſo againſt the law of nature and of nations, for a man to be judge in his own proper cauſe, *judex in propria cauſa*, eſpecially *in duello*, where fury, wrath, malice, and revenge are the rulers of the judgement. See more of private revenge, cap. Miſpriſion, in [*crimen commiſſionis.*]

Object. But it is objected, that this ſingle combat may be undertaken for revenge, and preſervation of the honour of the party grieved.

Reſponſ. 1. The honour or eſtimation of the party may more juſtly and notoriouſly be revenged, and repaired by the magiſtrate in publique, then by the party in private. 2. There is nothing honourable, that is againſt the laws of his country, and the law of nature and nations. 3. Whatſoever is againſt the law of God is impious and diſhonourable. 4. The eminent danger of the parties ſeeking private revenge. Firſt, concerning the ſoules of both of them, as well of him that killeth (who is *vir ſanguinis*) as of him that is ſlain, and dieth in his malice: and as to the world, he that ſlayeth is in worſe caſe, then he that is ſlain. For the murderer loſeth not only his lands and goods, but his life alſo and his honour, which he ſo much reſpected: for by his attainder his blood ſhall be corrupted, and if he were noble, or gentle before, he thereby becomes ignoble and baſe, and he that is ſlain by law loſeth none of them: ſo as hereof it is truly ſaid, *Infælix pugna, ubi majus periculum incumbit victori, quàm victo.* 5. Not only the ſoul of man, but the body alſo, was originally made to the image of God, *Quicunque effuderit humanum ſanguinem, fundetur ſanguis illius, ad imaginem quippe Dei factus eſt homo.* Who ſo ſheddeth mans blood, by man ſhall his blood be ſhed, for in the image of God made he man. *Solus Deus, qui vitam dat, vitæ eſt dominus; nec poteſt quiſquam eam juſte auferre niſi Deus, vel gerens authoritatem Dei, ut judex.* And this was the reaſon, that amongſt Chriſtians it was not lawfull for the lord to kill his villain.

Gen. 9. 6.

In ancient time ſo much the law did reſpect honour, and order, as hear what Britton ſaith, *Si treſpas ſoit fait en temps de peace a chivaliers, ou a auters gents honorables per ribaudes ou auters viles perſons, ſi le ferue ſoit per felony, &c. ſauns deſert del chivalier, que le ribaude perdra ſon poigne dount il treſpaſſa.* Brit. c. 25. f. 49. b.

And many ordinances, laws, and acts of parliament, which doe prohibit the pardon of wilfull murder, are alſo grounded upon the law of God, to the end none ſhould offend in hope of pardon. * *Non accipies pretium ab eo qui reus eſt ſanguinis, ſtatim enim et ipſe morietur. Ne polluatis terram habitationis veſtræ, quæ cruore maculatur; nec aliter expiari poteſt, niſi per ejus ſanguinem, qui alterius ſanguinem effuderit.* Ye ſhall take no ſatisfaction for the life of a murtherer, which is guilty of death, but he ſhall be ſurely put to death: ſo ye ſhall not pollute the land wherein you are, for bloud defileth the land, and the land cannot be cleanſed of the bloud that is ſhed therein, but by the bloud of him, that ſhed it. Glouc. 6 E. 1. c. 9. 2 E. 3. ca. 2. 4 E. 3. ca. 13. 14 E. 3. cap. 15. 13 R. 2. St. 2. c. 1. Read theſe ſtat. [158] * Num. 35. 31. 33. See before in chapter of murder.

And this law is confirmed by Chriſt himſelf in the Goſpel, and by the laſt book of holy ſcripture. *Omnes qui acceperint gladium gladio peribunt. Qui in gladio occiderit, oportet eum gladio occidi.* Mat. 26. 52. Apocal. 13. 10.

But albeit upon the ſingle combate no death enſue nor blood drawn, yet the very combate for revenge is an affray, and a great breach of the kings peace, an affright and terrour to the kings ſubjects, and is to be puniſhed by fine and impriſonment, and to find ſureties for their good behaviour; for it is *vi et armis, et contra pacem domini regis, &c.* and in reſpect of incrochment upon royall authority for revenge, it is *contra coronam et dignitatem.* Affray. Trin. 10 E. 3. Coram rege, Rot. 87. North.

An affray is a publique offence to the terrour of the kings ſubjects, and is an Engliſh word, and ſo called, becauſe it affrighteth and maketh men afraid, and is enquirable in a leet as a common nuſans. See the ſtatute of 2 E. 3. c. 3. where it is; *(en effraier de la pais,)* and the writ grounded upon that ſtatute ſaith, *In quorundam de populo terrorem*, as it appeareth in F. N. B. fo. 249. f. and the Regiſter agreeth with the originall, and therefore the printed book *(en affray de la peace)* muſt be amended. 4 H. 6. fo. 10. 8 E. 4. fo. 5.

And if any ſubject by word, writing, or meſſage challenge another to fight with him, this is alſo an offence before any combate be performed, and puniſhable by law, and it is *contra pacem, coronam, et dignitatem.* For *quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud.* Or ſuch offenders may be puniſhed in the ſtar-chamber, whereof there be many preſidents. Now when an affray is made by ſingle combat, any ſtander by, that is no officer, may endeavour to part them, and prevent further danger, and the law doth incourage them hereunto; for if they receive any harm by the affrayours, they ſhall have their remedy by law againſt them, and if the affrayours receive hurt by the endeavouring only to part them, the ſtanders by may juſtifie the ſame, and the affrayours have no remedy by law. But if either of the parties be ſlain, or wounded, or ſo ſtricken, as he falleth down for dead, in that caſe the ſtanders by ought to apprehend the party ſo ſlaying, wounding, or ſtriking, or to endeavour the ſame by hue and cry, or elſe for his eſcape they ſhall be fined and impriſoned. But if the ſherif, juſtice of peace, conſtable, or other conſervatour of the peace doe not part the affrayers for the preſervation of the kings peace, and apprehend them being within his view, or doe not his uttermoſt endeavour *Regula.* 8 E. 2. cor. 295. 22 Aſſ. pl. 56.

endeavour to part and apprehend them, they may be fined and impriſoned for their neglect thereof, for they may command others to aſſiſt them, and therefore the rule holdeth in them, *idem eſt facere, et nolle prohibere cùm poſſis: et qui non prohibet, cum prohibere poſſit, in culpa eſt.* And if any be commanded to aſſiſt them therein, and refuſe or neglect the ſame, it is a contempt in them to be puniſhed by fine and impriſonment.

3 H. 7. 10 b. Bedingfields caſe.

Fleta, li. 1. c. 32. §. Duellum. 2. pt. of the Inſtit. W. 1. c. 40. Fleta ubi ſupra.

There is a *duellum* allowed by law depending a ſuit for the triall of truth, whereof we have ſpoken in another place, and as here it appeareth, there is a *duellum* againſt law: of both theſe an ancient authour ſaith thus, and firſt of the lawfull: *Duellum eſt ſingularis pugna inter duos ad probandum veritatem litis, et qui vicerit probaſſe intelligitur, et quamvis judicium Dei expectetur, ibidem, quicunque tamen monomachiam,* i. e. *ſingularem pugnam ſponte ſuſceperit vel optulerit, homicida eſt, et contrahit mortale peccatum. Et eodem modo judex qui authoritate deſert, vel præſtat, omneſque acceſſores, et conſulentes, faventes et auxiliantes, nec non et ſacerdos qui dat benedictionem.*

11 H. 3. tit. Droit. Fitz. 57.

In a writ of right, if the tenant wage battail by his champion, and if the champion after become blind by infirmity, and not *ex ſtultitia*, he ſhall be diſcharged of the battail. And if a man be appealed of felony, and gage battaile, and after become blind, *ut ſupra*, he ſhall be diſcharged of the battail, becauſe he becommeth ſo by the act of God. And if the appellant after battail waged become blinde upon any occaſion, the appellee *in favorem vitæ* ſhall goe quit. When iſſue is joyned to be tried by battail, and the triall by battail is become impoſſible by the act of God, or by the default of the appellant, the appellee goeth free.

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And this kind of battail, in caſe of appeals and writ of right, is by publique authority and courſe of law, whereunto all the people by an implied conſent are parties; and (as ſome hold) hath his warrant by the word of God by the ſingle battail between David and Goliah, which was ſtrucken by publique authority.

1 Regum, c. 17. ver. 4. 5, &c.

King E. 3. in the ſixteenth year of his reign, having war with the French king for his right to the kingdome of France, out of the greatneſſe of his minde, for love of his ſubjects, the ſaving of chriſtian bloud, and a ſpeedy tryall of the right, offered the ſingle combate with the French king, but he refuſed it.

Afterwards alſo, after long and chargeable wars between the crowns of England and France, for the right of the kingdome of France, it was an honourable offer which king R. 2. made to Charles the French king for ſaving of Chriſtians guiltleſſe bloud, and to put an end to that bloudy and lingring war, which we will rehearſe in the very words of the record it ſelf.

[a] 7 R. 2. m. 24. The offer of R. 2. to king Charles of France.

1. A ſingle combat between the two kings.

2. Or a combat between the two kings and three of their uncles on either ſide.

3. Or that a fit day and place might be aſſigned when under the univerſall conflict of both their armies, an end might be put to the war.

[a] *Rex dedit potem. Johanni duci Lancaſt' avunculo ſuo de certis requeſtis ſeu oblationibus Carolo regi Franc' faciend', viz. quod negotium bellicum inter prædictos reges finiatur.* 1. *Per certamen perſonarum ſuarum.* 2. *Vel aliter inter perſonas ſuas cum tribus patruis ipſorum ipſis utrinque adjunctis.* 3. *Aut alioquin quod dies congruus aſſignaretur et locus, quibus ſub univerſali certamine potentiarum ſuarum finis bello imponi valeat.* The duke of Lanc' according to his commiſſion made theſe offers from the king of England to king Charles of France, but he was *auditus, ſed non exauditus*; for king Charles liked none of theſe offers.

And

[b] And in *anno Domini* 1196. *anno regni Ricardi primi octavo*, Philip king of France ſent this challenge to Richard the firſt, that king R. would chooſe five for his part and he the king of France would appoint five for his part, which might fight in liſts for triall of all matters in controverſie between them for the avoiding of ſhedding of more guiltleſſe bloud. King Richard accepted the offer, with condition that either king might be of the number, but this condition would not be granted. [b] N. Trivet.

[c] Theſe, and the like offers, as they proceeded from high courage and greatnes of mind, ſo had they been lawfull, if they had been warranted by publique authority. [c] See the 2. part of the Inſtitutes W. 1. ca. 20.

CAP. LXXIII.

Againſt going or riding armed. [160]

Item, IT is enacted, that no man, great or ſmall, of what condition ſoever he be, (except the kings ſervants in his preſence and his miniſters in executing *des mandements le roy*, or of their office, and ſuch as be in their company aſſiſting them, and alſo upon a cry made for armes to keep the peace, and the ſame in ſuch places where ſuch things happen) be ſo hardy to come before the kings juſtices, or other the kings miniſters doing their office, with force and armes, nor bring force in affray of the people, nor to goe nor ride armed by night nor by day, &c. before the kings juſtices, or in any place whatſoever, upon paine to forfeit their armor to the king, and their bodies to priſon at the kings pleaſure, and to make fine, and ranſome to the king, &c. 2 E. 3. cap. 3. Paſch. 18 E. 3. Coram rege. Rot. 146. Midd. 8 R. 2. cap. 13. the printed book is 7. but it ought to be 8. and ſo recited in 20 R. 2. ca. 1. Lib. 5. fo. 72. St. Johns caſe. 20 R. 2. cap. 1.

Upon this ſtatute two things fall into conſideration. Firſt, what the common law was before the making of this ſtatute. Secondly, the true ſenſe and expoſition of this act. For it appeareth by a record in 29 E. 1. *quòd non liceat torneare, bordeare, juſtas facere, aventuras gueiare, ſeu ad arma præſumere, ſine licentia regis.* See Britton, fo. 29. b. It was called *turneamentum decurſus*, of turning and winding, in reſpect of the agility, as well of the horſe, as of the man. For in thoſe daies this deed of chivalry was at randon, whereupon great perill enſued. Therefore in the reigne of E. 3. for ſafety the tilt was deviſed. See the ſtatute of 7 E. 2. *De defenſione portandi arma*, and the ſtatute of W. 1. cap. 9. & cap. 17. W. 2. cap. 39. and the expoſitions upon the ſame. Paſch. 29 E. 1. coram rege. Rot. 101. Eſſex. Paſch. 18 E. 1. coram rege. Rot. 32. Glouc. Vet. Mag. Cart. 2. part. fo. 40. b.

It is *lex et conſuetudo parliamenti*, that whereſoever the parliament is holden proclamation ſhould be made forbidding wearing of armor, and exerciſe of playes and games of men, women, or children, in or about the city, or place where the parliament is holden, leſt the proceedings in the high court of parliment *pro bono publico*, ſhould thereby be hindred or diſturbed. Rot. Parl. 6 E. 3. nu. 2. & 3. 13 E. 3. nu. 2. 14 E. 3. nu. 2. 15 E. 3. nu. 2. 17 E. 3. nu. 2. 18 E. 3. nu. 2. 25 E. 3. nu. 50. Parl. 1 & 25 E. 3. Parl. 2. nu. 5.

If

[a] 11 H. 7. fo. 23. vide before cap. *Homicide.* Brook Coron 229. See 24 H. 8. cap. 13. Juſts, Turnies, Bariers, &c.

[a] If any by mutuall aſſent, do uſe juſts or turneaments, or to play at ſword and buckler, or any other deeds of armes, and the one killeth the other, this is felony, for that it is not lawfull to uſe them without the kings licence; which agreeth with the record aboveſaid, of 29 E. 1.

[b] Paſch. 18 E. 3. Coram rege Rot. 146. Nota bene.

[b] *Willus Jordan inventus fuit vagans armatus de platis, attachiatus, &c. compertum eſt per juratores, quòd minatus fuit per quoſdam ignotos, et quòd pro ſalvatione vitæ ſuæ, platas prædictas oppoſuit ſuper corpus ſuum, tamen invenit ſecuritatem pro bono geſtu ſuo.*

[c] 25 E. 3. cap. 2.

[c] The clauſe of the ſtatute of 25 E. 3. concerning this matter, we have reſerved to this place, viz.

[d] See before cap. *High treaſon.* verb. *Ou ſi home levy guerre.* fo. 9.

[d] And if per caſe any man of this realm ride armed covertly or ſecretly, with men of arms, againſt any other to ſlay him, or rob him, or to take and keepe him, till he hath made fine or ranſome, it ſhall not be adjudged treaſon, but it ſhall be judged felony or treſpaſſe, according to the lawes of the realme of old time uſed, and according, as the caſe requires. And if in ſuch caſe, or other like, before this time any juſtices have judged treaſon, and for this cauſe the lands and tenements have come into the kings hands as forfeit, the chiefe lords of the fee ſhall have the eſcheats of the tenements holden of them, whether that the ſame tenements be in the kings hands, or in others, by gift, or in other manner. Saving alwayes to our lord the king, the yeare, and the waſt, and the forfeitures of chattels, which pertain to him in the caſes above-named. And that writs of *ſcire facias* be granted in ſuch caſe againſt the land tenants without other originall, and without allowing any protection in the ſaid ſuit. And that of the lands which be in the kings hands, writs be granted to the ſherifs of the counties, where the lands be, to deliver them out of the kings hands without delay.

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Concerning the point of felony, it muſt be obſerved, that at the making of that ſtatute, and by the lawes of the realme of old time uſed in ſuch caſe, when any purpoſed to ſlay, and declare it by ſuch overt act, *voluntas reputabatur pro facto*, as hath been ſaid before; and ſo is this branch concerning that point to be underſtood.

Vide cap. High treaſon, verb. *Fait compaſſer*, fo. 6.

Scire fac.

And that writs of ſcire fac. be granted.] Here it may appeare what ſpeedy remedy by *ſcire fac.* the makers of this law gave for reſtitution to be made, where any of the juſtices had in any of the caſes mentioned in this branch judged it treaſon, which is declared by this law to be againſt law.

Note for reſtitution. See hereafter cap. Reſtitution.

Now let us peruſe the words of the ſaid act of 2 E. 3.

W. 1. ca. 9. & 17. W. 2. cap. 29. 18 E. 2. execution, 251. 19 E. 2. ibid. 247. 3 H. 7. fo. 1 et 10. b. 14 H. 7. 8. Lib. 5. fo. 91. Semaynes caſe.

His miniſters in executing.] By the order of the common law and ſtatutes of the realme, the ſherif, or other miniſter of the king in execution of the kings writs, or proces of law, might after reſiſtance take *poſſe comitatus.* For, *ſequi debet potentia legem et non antecedere.*

Des mandements le roy.] That is, of the kings writs, and proces of law, *ſecundum legem et conſuetudinem Angliæ.* Though in this act there

there be three ſpeciall exceptions, yet the law doth make another exception, and that is, to aſſemble force to defend his houſe, as hereafter ſhall be ſaid.

To come before the kings juſtices, or other the kings miniſters doing their office, with force and armes.] Bracton doth notably write of the diverſity of forces, viz. that there is *vis expulſiva, perturbativa, inquietiva, abiativa, compulſiva, &c.* which you may read in him. And then (which is pertinent to our purpoſe) he ſaith: *Eſt etiam vis armata, (armis dejectum dico qualitercunque fuerit vis armata) non ſolum ſi quis venerit cum telis, verum etiam omnes illos dicimus armatos, qui habent cum quo nocere poſſunt. Telorum autem appellatione omnia, in quibus ſinguli homines nocere poſſunt, accipiuntur: ſed ſi quis venerit ſine armis, et ipſa concertatione ligna ſumpſerit, fuſtes, et lapides, talis dicetur vis armata; ſi quis autem venerit cum armis, armis tamen ad deficiendum non uſus fuerit, et dejecerit, vis armata dicitur eſſe facta; ſufficit enim terror armorum ut videatur armis dejeciſſe.* Agreeing with that of the poet,

Bracton, lib. 3 fo. 162.

Jamque faces et ſaxa volant, furor arma miniſtrat. Virgil.

Britton ſaith, *Nous volons, que touts gents pluis uſent judgement, que force.* Britton, 116. a.

Nor to bring force in affray of the (pails, i.) country.] This act is notably expounded by the writ in the Regiſter, and F. N. B. for by that writ it appeareth, that if any doth enter into, or detaine with force any houſes, lands, or tenements, the party grieved may have a writ upon this ſtatute, directed to the ſherif, by force of which writ, if the ſherif find the force, then if any after proclamation made, (which proclamation is by reaſonable conſtruction to be made for avoiding of bloodſhed) ſhall diſobey, or if it be found by inquiſition, the ſherif is to ſeize their armes and weapons, and to arreſt and take the offenders and commit them to priſon, &c. But note the ſherif cannot reſtore the party grieved upon this writ to his poſſeſſion, [a] no more then he can upon the writ *de vi laica, removenda*, but reſtitution muſt be made by force of the ſtatutes of 8 H. 6. and 21 Jac. [b] And yet in ſome caſe a man may not onely uſe force and armes, but aſſemble company alſo. As any may aſſemble his friends and neighbours, to keep his houſe againſt thoſe that come to rob, or kill him, or to offer him violence in it, and is by conſtruction excepted out of this act: and the ſherif, &c. ought not to deal with him upon this act; for a mans houſe is his caſtle, *et domus ſua cuique eſt tutiſſimum refugium*; for where ſhall a man be ſafe, if it be not in his houſe? and in this ſenſe it is truly ſaid,

See the chapter next before. verb. *Affraye.* Regiſtrum. F. N. B. 249. f. Nota. c Vide lib. 5. fo. 9. Semayes caſe F. N. B. 54.

[a] 8 H. 6. cap. 9. 21 Jac. cap. 25. [b] 3. E. 3. cor. 303. 305. 26 Aſſ. p. 22. 21 H. 7. 39.

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Armaque in armatos ſumere jura ſinunt.

But he cannot aſſemble force, though he be extreamly threatned, to goe with him to church, or market, or any other place, but that is prohibited by this act.

Nor to goe armed by night, or by day, &c. before the kings juſtices in any place whatſoever.] Sir Thomas Figett knight went armed under his garments, as well in the palace, as before the juſtice of the kings bench: for both which upon complaint made, he was arreſted by ſir William Shardſhill chiefe juſtice of the kings bench, and being charged therewith, he ſaid that there had been debate between him and ſir John Trevet knight in the ſame week, at Pauls

21 H. 7. 39. Lib. 5. fo. 91. b. Semaynes caſe. 24 E. 3. fo. 33.

in

in London, who menaced him, &c. and therefore for doubt of danger, and ſafeguard of his life, he went ſo armed. Notwithſtanding the court upon their view awarded, that the armes were forfeited, and thereupon the ſame were ſeiſed, and he commanded to ward in the Marſhalſea during the kings pleaſure. Sir Thomas prayed to find mainpriſe, which was denied, untill the pleaſure of the king was known, becauſe he was impriſoned during the kings pleaſure, according to this ſtatute.

24 E. 3. ubi. ſupra. Vide the 4. part of the Inſtitutes, cap. *Leet.* 20 R. 2. cap. 1. Vid. indorſſ. clauſ. 2 E. 2. 19. 22.

Upon paine to forfeit their armor, &c.] It appeareth before by the caſe of ſir Thomas Figett, that the offender was to bee puniſhed according to this act, but by forfeiture of the armor and impriſonment; but the ſtatute of 20 R. 2. cap. 1. doth add fine, and impriſonment.

And that the kings juſtices, in their preſence, &c.] So did ſir William Shardiſhill, as is aboveſaid.

And other miniſters in their baliwickes, &c.] That is to ſay, ſherifs, bailifs of liberties, &c.

Lords of franchiſes.] And their bailifs, maiors, and bailifs of cities, and borowes within the ſame cities and borowes, and borowholders, conſtables, and wardens of the peace within their wards ſhall have power to execute this act. And the juſtices aſſigned at their comming down ſhall inquire how ſuch officers, and lords have exerciſed their offices in this caſe, and to puniſh them whom they find that have not done that which pertaineth to their office. See 12 R. 2. cap. 6.

Regiſtrum. F. N. B. 249. f. 24 E. 3. fo. 33.

It is to be obſerved, that upon this ſtatute by the reſolution of the judges a writ was framed, and inſerted into the Regiſter, when any with force and armes enter any lands and tenements, or detaine the ſame with force and armes, directed to the ſherif, reciting the force, and our act, (and ſaith) *Nos ſtatutum prædictum inviolabiliter obſervari, et idem infringentes juxta vim et effectum ejuſdem ſtatuti caſtigare facere volentes et punire, tibi præcipimus, &c. publice proclamari facias, &c.* as in the writ. And here is a ſecret in law, that upon any ſtatute made for the common peace, or good of the realm, a writ may be deviſed for the better execution of the ſame, according to the force and effect of the act.

Vide 36 E. 3. ca. 9. ſimile.

Note, proclamations are of great force, which are grounded upon the laws of the realme.

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CAP. LXXIV.

Of Perjury and Subornation of Perjury, and incidently of Oaths.

5 El. ca. 9.

EVERY perſon which ſhall unlawfully and corruptly procure any witneſſe to commit any wilfull, and corrupt perjury in any matter or cauſe depending in ſuit, and variance, by any writ, action, bill, complaint, or information in any of the kings courts of chancery, ſtar-chamber, or in any of the

the queens majeſties courts of record, or in any leet, view of frankpledge, ancient demeſne court, hundred court, court baron, or of the ſtannary, or elſewhere within any of the kings dominions of England or Wales, or the marches of the ſame: or ſhall unlawfully, and corruptly procure and ſuborn any witneſſe to teſtify *in perpetuam rei memoriam.* That then every ſuch offender ſhall forfeit the ſumme of forty pound, &c. And if any perſon either by ſubornation, or by their own act, conſent or agreement, wilfully and corruptly commit any manner of wilfull perjury by their depoſition in any of the courts abovementioned, or being examined *ad perpetuam rei memoriam*; then every perſon ſo offending ſhall loſe and forfeit twenty pound, and to have impriſonment by the ſpace of ſix moneths without bail or mainpriſe, &c. the one moiety of all which forfeitures to be to the queen, and the other moiety to ſuch perſon or perſons as ſhall be grieved, &c.

Albeit by the common law tryall of matters of fact are by the verdict of twelve men, &c. and depoſition of witneſſes is but evidence to them: yet, for that moſt commonly juries are led by depoſition of witneſſes, perjury of witneſſes was ſeverely puniſhed by the ancient laws of this realm; perjury itſelf being forbidden by the law of God, [a] *Non perjurabis in nomine meo, nec pollues nomen Dei tui.* And again, *Non perjurabis, reddes domino juramenta tua.*

A falſe witneſſe is called *perjurus, quia perperam jurat.* [b] Perjury before the conqueſt was puniſhed ſometime by death, ſometime by baniſhment, and ſometime by corporall puniſhment, &c.

[c] *Aſcuns ſont punies per cowper de langues, come ſoiloit eſtre de faux teſtmoignes.* But too ſevere laws are never duly executed. Afterwards it came to be more milde, for [d] Fleta ſaith, *Atrox injuria eſt quæ omnium mobilium amiſſionem confert, &c. de perjurio convictis.*

Afterwards it came to fine and ranſome, and never to bear teſtimony.

Et queux ſe voillont perjurer pur lower, ou par aſcun doute de aſcun, et ceux ſont reints a noſtre volunt, et mes ne ſoient crus per nul ſerement. And it appeareth in 7 H. 6. that he that is perjured ſhall be fined and impriſoned.

Thomas Vigrus, et duo alii ſunt culpabiles, &c. perjurati pro fractione corbellarum Johannæ de Huntingfield in ſeparali piſcaria ſua in aqua de Hadfeld.

Qui teſtes de perjurio convincere ſatagit, multo illis plures, producere neceſſe habet.

The puniſhment of perjury in jurors for a falſe verdict was ſo ſevere by the common law, as few or no juries were upon juſt cauſe convicted, for the judgement * againſt them was, 1. *Quod amodo amittant liberam legem imperpetuum.* 2. *Non trahantur in teſtimonium veritatis.* 3. *Bona et catalla ſua forisfaciant regi.* 4. *Terræ et tenementa ſua capiantur in manus regis.* 5. *Quod uxores et liberi ſui amodo amoveantur.* 6. *Quod terræ et tenementa ſua extirpentur, &c.*

[a] Exod. 20. 13. Levit. 19. 11. Mat. 5. 34.

[b] Leges Edw. c. 3. Ethelſt. c. 10. 25 Edm. c. 6. Canuti, ca. 6. & 35. &c. Edw. and Gru. c. 11.

[c] Mir. ca. 4. § de paines. Int. Leg. Canuti, c. 15. Conviciatori linguæ exciditor.

[d] Fleta, li. 2. ca. 1. § Item Atrox, &c.

Britton, fo. 38, 237, 238.

7 H. 6. fo. 25. Hil. 8 E. 1. in Communi banco Rot. 38. Eſſex, Forteſcue, ca. 32.

* [164]

Vide 1. pt. of the Inſtitutes. Verb. Attaint, Sect. 514. Glanvill, lib. 2. ca. 19. 6 H. 3. Attaint. 72. Bract. li. 4. fo. 292. b. Fleta, lib. 5. cap. 21. Britton, fo. 245. 8 E. 2. Judgement. 196. 16 E. 3. ibidem 109. Mich. 3 H. 5. Coram rege Rot. 14. & 49. Forteſcue ca. 29.

7. *Quod*

7. *Quod capiantur, et in gaolam detrudantur.* Which ſheweth how odious perjury was in the eye of the law: and this law doth yet remain in force; but a milder puniſhment is ſet down by the ſtatute of 23 H. 8. wherein the party grieved hath election to ground his writ of attaint upon this ſtatute, or to take his remedy at the common law.

23 H. 8. ca. 3.

For perjury concerning any temporall act. the eccleſiaſticall court hath no juriſdiction; and if it be concerning a ſpirituall matter, the party grieved may ſue for the ſame in the ſtar-chamber. See the ſtatutes of 3 H. 7. ca. 1. 11 H. 7. ca. 25. 32 H. 8. ca. 9. And when you have read the caſe in Mich. 7 & 8 Eliz. Dier 242, 243. you will confeſſe how neceſſary the reading of ancient authors and records is, and the continuall experience in the ſtar-chamber is againſt the opinion conceived there.

2 H. 4. 10.
11 H. 4. 88.
20 E. 4. 10. b.
22 E. 4.
13 El. Dier, 302.
Mich. 7 & 8 El. Dier, 242, 243.

And Mich. 10. Jac. in the ſtar-chamber in the caſe of Rowland Ap Eliza, it was reſolved, that perjury in a witnes was puniſhable by the common law, as hereafter ſhall be ſhewed more at large. But now let us peruſe the words of the ſtatute.

Mich. 10. Ja. Rowl. Ap Elizaes caſe, in cam. ſtellat. See hereafter Verb. Information.

By any writ, action, bill, complaint, or information.] Out of theſe words are perjury, and ſubornation of perjury upon an indictment for the king (for example of riot) as it was reſolved in Flowers caſe; becauſe that perjury upon an indictment is not within the ſtatute. But ſeeing perjury was an offence puniſhable by the common law; though the indictment of Flower grounded upon this ſtatute was overthrown, yet is ſuch perjury upon an indictment puniſhable, and moſt commonly puniſhed in the ſtar-chamber.

Mich. 40 & 41 El. Lib. 5. fo. 99. in Flowers caſe.

Information.] By this it appeareth, that perjury committed in an information exhibited by the kings attorny, or any other for the king, by any witnes produced on the behalf of the king, is puniſhable either by this act or by the common law. And ſo it was reſolved in the ſaid caſe of Rowl. Ap Eliza, which was this. The kings attorny preferred an information in the exchequer againſt Hugh Nanny eſquire the father, and Hugh Nanny the ſon, and others for intruſion and cutting down a great number of trees, &c. in Penroſe in the county of Merioneth. The defendant pleaded not guilty, and the tryall being at the bar, Rowl. Ap Eliza was a witneſſe produced for the king, who depoſed upon his oath to the jury, that Hugh the father and Hugh the ſon joyned in ſale of the ſaid trees, and commanded the vendees to cut them down: upon which teſtimony the jury found for the king, and aſſeſſed great damages, and thereupon judgement and execution was had. Hugh Nanny the father exhibited his bill in the ſtar-chamber at the common law, and charged Rowland Ap Eliza with perjury, and aſſigned the perjury, in that he the ſaid Hugh the father never joined in ſale, nor commanded the vendees to cut down the trees, &c. And it was reſolved, firſt, that perjury in a witneſſe was puniſhable by the common law. Secondly, that perjury in a witneſſe for the king was puniſhable by the common law, either upon an indictment, or in an information, or by this act in an information. And the ſaid Rowland Ap Eliza was by the ſentence of the court convicted of wilfull and corrupt perjury.

The caſe of Rowland ap Eliza in the ſtar-chamber ubi ſupra.

But for our more orderly proceeding, let us define, or deſcribe what perjury is in legall underſtanding, both upon this ſtatute, and at the common law.

Perjury

Perjury is a crime committed, when a lawfull oath is ministred by any that hath authority, to any person, in any judiciall proceeding, who sweareth absolutely, and falsly in a matter materiall to the issue, or cause in question, by their own act, or by the subornation of others. Now let us peruse the branches of this description.

Perjury described.

A lawfull oath.] This word oath is derived of the Saxon word *coth;* and is expressed by three severall names, viz. 1. *Sacramentum, à sacra, et mente,* because it ought to be performed with a sacred and religious mind. *Quia jurare, est Deum in testem vocare, et est actus divini cultus.* 2. *Juramentum à jure,* which signifieth law and right, because both are required and meant, or because it must be done with a just and rightfull mind. 3. *Jusjurandum,* compounded of two words, *à jure, et jurando.* In the common law *sacramentum* is most commonly used: in our books and ancient statutes published in French, *serement,* of the French word *serment,* is used.

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Serment or sarment. i. sacrement. i. sacramentum.

An oath is an affirmation or deniall by any Christian of any thing lawfull and honest, before one or more, that have authority to give the same for advancement of truth and right, calling Almighty God to witnesse, that his testimony is true. And it is twofold, either *assertorium ut de præterito, sicut testes, &c. seu promissorium de futuro, sicut judices, justiciarii, officiarii, &c.* So as an oath is so sacred, and so deeply concerneth the consciences of Christian men, as the same cannot be ministred to any, unlesse the same be allowed by the common law, or by some act of parliament; neither can any oath allowed by the common law or by act of parliament be altered, but by act of parliament. It is called a corporall oath, because he toucheth with his hand some part of the holy scripture.

Fleta, li. 5. ca. 2. Brit. c. 97. fo. 237. 8. b. 19. 74. 134. 165. 236. b. Fleta, li. 5. ca. 21.

So resolved an. 26 El. in the case of the under sherif.

The oath of the kings privy councell, the justices, the sherif, &c. was thought fit to be altered and enlarged, but that was done by authority of parliament. For further proof whereof, and of the matters abovesaid, see the statutes here quoted, and it shall evidently appear, that no old oath can be altered, or new oath raised without an act of parliament, or any oath ministred by any that have not allowance by the common law, or by an act of parliament.

Magna Cart. c. 6. Stanf. Pr. 17. F. N. B. 264. W. 1. 3 E. 1. c. 40. 18 E. 3. ubi sup. 5 R. 2. cap. 12. 6 R. 2. ca. 12. 4 H. 4. ca. 18. ca. 2. 23 H. 8. 2 H. 5. ca. 7. 8 E. 4. cap. 2. 1 R. 3. cap. 6. & 15. 19 H. 7. cap. 14. 14 H. 8. cap. 5. 32 H. 8. cap. 46. 2 E. 6. ca. 13. 27 El. cap. 12. See 3 Jac. c. 4.

And to conclude this point, it was resolved in parliament holden in *anno* 43 Eliz. that the commissioners concerning policies of assurances could not examine upon oath, because they had no warrant either by the common law, or by any act of parliament: and therefore it was enacted at that parliament, that it should be lawfull for the said commissioners to examine upon oath any witnesse, &c. At this parliament I attended, being then attorny generall. And oaths that have no warrant by law, are rather *nova tormenta, quam sacramenta,* and it is an high contempt to minister an oath without warrant of law, to be punished by fine and imprisonment. And therefore commissioners (that set by force of any commission that is not allowed by the common law, nor warranted by authority of parliament) that minister any oath whatsoever, are guilty of an high

43 Eliz. ca. 12.

high contempt, and for the ſame are to be fined and impriſoned: * For commiſſions are legall, and are like the kings writs, and none are lawfull but ſuch as are allowed by the common law, or warranted by ſome act of parliament: and therefore commiſſions of new inquiries or of novell invention, are againſt law, and ought not to be put in execution.

* Commiſſions. Regiſt. 1, 2. 3. 125, 126. 88. 128. 138. 161. F. N. B. 110, 111. 2 E. 3. 26. Paſch. 44 E. 3. Coram rege. Rot. 2. 24 E. 3. Com. Br. 3. 29 E. 3. 30, 31. 18 E. 3. ca. 1. & 4. 18 E. 3. Stat. 2. ca. 6. Rot. Parl. 18 E. 3. nu. 47. 28 E. 3. ca. 19. Rot. Parl. 50 E. 3. no. 56. 61. 2 H. 4. nu. 22. optime. 4 H. 4. ca. 9. Rot. Parl. 9 H. 4. nu. 36. 42 Aſſ. p. 5. 12. 42 E. 3. ca. 3. Dier, 1 Eliz. 106. Scrogs caſe.

And albeit divers of the kings courts in England proceed not according to the courſe of the common law, yet are their proceedings allowed either by the common law or by ſome act of parliament.

Dorſſ. clauſ. an. 19 R. 2. nu. 17. * Ex d. 20. 4. Deut. 5. 6. Pſalme 86. 11. 96. 7. 115. 4. Levit. 26. 1. &c. Eſay 44. 9. &c. Jeremy 10. 3. &c. Sapient. 13. 10. &c. Auguſt. Epiſt. 110. ad Jan. ca. 11. idem de fide & ſymbolo, ca. 7. idem in Pſal. 113. con. 2. Gregor. lib. 9. Epiſt. 9.

Certain poor Chriſtians that had ſpoken againſt the worſhipping of images, were by the biſhops ſworn to worſhip images; * which oath was againſt the expreſſe law of God, and againſt the law of the land, for that they had no † warrant to miniſter the ſame. Let the children of the church be called and inſtructed by the teſtimonies of the holy ſcripture, that nothing made with hands may be worſhipped. See the ſecond part of the Inſtitutes, Marlbridge, cap. 14. & 19. concerning oathes, and ſpecially out of Glanvile, concerning the nobility of this realm, and W. 1. ca. 38.

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Bracton, lib. 4. fo. 186.

By any having authority.] For where the court hath no authority to hold plea of the cauſe, but it is *coram non judice*, there perjury cannot be committed. For as Bracton ſaith, *Sacramentum habet in ſe tres comites, veritatem, juſtitiam et judicium: veritas habenda eſt in jurato; juſticia et judicium in judice.*

Jer. 4. 2.

And all this is grounded upon the law of God, *Jurabis vivit dominus, in veritate, et judicio, et in juſtitia.*

Trin. 13 Ja. Li. 11. f. 98. Bagges caſe.

In any judiciall proceeding.] For though an oath be given by him that hath lawfull authority, and the ſame is broken, yet if it be not in a judiciall proceeding, it is not perjury puniſhable either by the common law, or by this act, becauſe they are generall and extrajudiciall, but ſerve for aggravation of the offence, as general oathes given to officers or miniſters of juſtice, citizens, burgeſſes, or the like, or for the breach of the oath of fealty or allegeance, &c. they ſhall not be charged in any court judiciall for the breach of them afterwards. As if an officer commit extortion, he is in truth perjured, becauſe it is againſt his generall oath: and when he is charged with extortion, the breach of his oath may ſerve for aggravation.

If a man calleth another perjured man, he may have his action upon his caſe, becauſe it muſt be intended contrary to his oath in a judiciall proceeding: and ſo it is termed in our ſtatute of 5 Eliz. but for calling him a forſworne man, no action doth lye: becauſe the forſwearing may be extrajudiciall. If the defendant perjureth himſelf in his anſwer in the chancery, exchequer chamber, &c. he

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is not puniſhable by this ſtatute, for it extendeth but to witneſſes, but he may be puniſhed in the ſtar-chamber, &c.

Who ſweareth abſolutely.] For the depoſition muſt be direct and abſolute, and not *ut putat*, nor *ſicut meminit*, nor *ut credit*, &c. Bract. lib. 4. fol. 289. Fleta, lib. 5. ca. 21.

And falſely.] Herein the law taketh a diverſity between falſehood in expreſſe words, and that is only within this ſtatute, and falſehood in knowledge or minde, which may be puniſhed though the words be true. For example, damages were awarded to the plaintife in the ſtar-chamber according to the value of his goods riotouſly taken away by the defendant: the plaintiffe cauſed two men to ſweare the value of his goods, that never ſaw nor knew them; and though that which they ſware was true, yet becauſe they knew it not, it was a falſe oath in them, for the which both the procurer and the witneſſes were ſentenced in the ſtar-chamber. Gurneis caſe in the ſtar-chamber, Mic. 9 Jac.

For (as Fleta ſaith) *Ad rectum juramentum exiguntur tria, veritas, conſcientia, et judicium:* truth and conſcience in the witneſſe, and judgement in the judge. And herewith agreeth Bracton, that a man may ſweare the truth, and yet be perjured. *Dicunt quidam verum, et mentiuntur, et pejerant, eo quòd contra mentem vadunt. Ut ſi Judæus juraverit Chriſtum natum ex virgine, perjurium committit, quia contra mentem vadit, quia non credit ita eſſe ut jurat.* Fleta, ubi ſupra. Bracton, lib. 4. fo. 289.

By the ancient law of England in all oathes equivocation is utterly condemned; for Britton ſaith, *Serement eſt homeſt, et leall, quant ſa conſcience demeſne accord a cheſcun point a la bouche ne pluis, ne meins, et ſil ad diſcord, donqs' eſt perillous.* And this is grounded upon the law of God. *Nunquid Deus indiget mendacio veſtro, ut pro illo loquamini dolos, aut decipietur ut homo veſtris fraudulentiis? Perjuri ſunt qui ſervatis verbis juramenti decipiunt aures eorum qui accipiunt.* If equivocation ſhould be permitted tending to the ſubverſion of truth, it would ſhake the foundation of juſtice. Equivocation. Britton, fo. 237. Job 13. 7.

In a matter materiall to the iſſue, or cauſe in queſtion.] For if it be not materiall, then though it be falſe, yet it is no perjury, becauſe it concerneth not the point in ſuit, and therefore in effect it is extrajudicial. Alſo this act giveth remedy to the party grieved, and if the depoſition be not materiall, he cannot be grieved thereby. And Bracton ſaith, *ſi autem ſacramentum fatuum fuerit, licet falſum, tamen non committit perjurium.* [167] Bracton, lib. 4. 188. Fleta, lib. 5. ca. 21. accord.

By their own act, &c.] This clauſe of the ſtatute, although it be more generall then the clauſe of procurement, yet ſeeing the firſt clauſe concerning procurement, extendeth not to perjury upon an indictment: this clauſe by conſtruction ſhall extend no further than the former. See Lib. Intr. Coke, fo. 164, 165, 362. Flowers caſe. ubi ſupra.

Or by the ſubornation of other.] Subornation is derived of *ſub* and *orno*, and *ornare* in one of his ſignifications is to prepare, ſo as *ſubornare* is as much to ſay, as to prepare ſecretly, or underhand. *Eſt autem ſubornare quaſi ſubtus in aure ipſum male ornare, unde ſubornatio dicitur de falſi expreſſione, aut de veri ſuppreſſione.* And here is to be noted, that in the judgement of the parliament *plus peccat author quam actor;* for the ſuborner forfeits 40 li. and he that is ſuborned but 20 li. Fleta ſaith, *Si ſervus cogatur ſcienter à domino perjurare, uterque eſt perjurus; qui autem provocat eum ad jurandum quem ſcit* Fleta, lib. 5. ca. 21.

falſum jurare, vel exigit, vel recipit juramentum, talis vincit homicidam, quia homicida ſolum corpus occidit, iſte vero animam ſuam et alterius: et peccat, qui alium audit falſum jurare, ſcit, et tacet.

Mic 29 & 30 Eliz. coram rege.

In an action of perjury brought upon this ſtatute, the plaintife counted, that the defendant *falſo dixit et depoſuit, &c.* and in what action, upon what iſſue, and in what court, &c. and concluded, *et ſic commiſit voluntarium et corruptum perjurium.* And it was ruled by the whole court, that the count was vicious and inſufficient for two cauſes. Firſt, for that in this act of 5 Eliz. as here it appeareth, there be two diſtinct clauſes, one if he be perjured of his own proper act; the other if he be perjured by ſubornation, &c. and the plaintife ought to declare in certainty, within which of them the defendant is perjured. The ſecond cauſe was, where the act ſaith [wilfully and corruptly commit any wilfull perjury, &c.] and the words of the count be *falſo dixit et depoſuit:* and ſaith not, *voluntarie et corrupte*; and the ſaid clauſe, *et ſic commiſit voluntarium et corruptum perjurium*, ſalveth not the former inſufficiency, becauſe it is but a concluſion upon the former matter.

27 Eliz. Mellers caſe.

And the like judgement was given in this court, as to this latter point *anno* 27 Eliz. in the caſe of one Mellers of Lincolneſhire.

Dier, 12 El. 288.

That as well the judge and judges of every ſuch of the ſaid courts.] If the perjury be committed by any witneſſe depoſed in the chancery, &c. and the party grieved commenceth his ſuit there upon this act, the ſame and all the proceedings thereupon muſt be in Latin according to the courſe of the common law, and the defendant ſhall not be ſworn to his anſwer, nor examined upon interrogatories (unleſſe the court of chancery had before this act uſed to examine perjuries, and to examine the defendant upon oath upon interrogatories before this act, for then ſuch juriſdiction had been ſaved by a proviſo in this act) and when iſſue is joined, it ſhall be tried in the kings bench, as by law it ought, *et ſic de ſimilibus.*

25 E. 3. 42. b. cor. 131.

If a man be taken for a ſuſpect, and he is not indicted, nor is there any certaine cauſe to arraign him, the court may give him the oath of allegiance, viz. *Que il ſerra foial et loyal, &c.* Vide 45 E. 3. 17. b. ſimile devant, cap. 7. De Conjuration, &c. in fine. 22 E. 4. 36. 20 H. 6. 37. Attorney abjure.

See more of Perjury and of Witneſſes in the fourth part of the Inſtitutes, cap. Commiſſioners for examination of witneſſes. See 21 Jac. cap. 20. a good act to prevent and reforme profane ſwearing.

CAP.

CAP. LXXV.

Of Forging of Deeds, &c.

IF any perſon or perſons upon his or their own head or imagination, or by falſe conſpiracy or fraud with others, ſhall wittingly, ſubtilly, and falſely forge (1), or make (2), or ſubtilly cauſe or wittingly aſſent (3) to be forged or made any falſe deed, charter (4), or writing ſealed (5), court roll, or the will of any perſon or perſons, in writing (6), to the intent that the ſtate of freehold or inheritance of any perſon or perſons, of, in, or to any lands, tenements, or hereditaments free-hold or coppy-hold, or the right, title, or intereſt of any perſon or perſons of, in, or to the ſame (8), or any of them, ſhall or may be moleſted, troubled, defeated, recovered, or charged, &c. (7) Or ſhall pronounce, publiſh, or ſhew forth in evidence any ſuch falſe and forged deed, charter, writing, court-roll, or will, as true (9), knowing the ſame to be falſe and forged (10), as is aforeſaid, to the intent above remembered, and ſhall be thereof convicted, either upon action or actions of forger of falſe deeds to be founded upon this ſtatute, at the ſuit of the party grieved, or otherwiſe according to the order and due courſe of the lawes of this realme, or upon bill, or information, to be exhibited into the court of ſtar-chamber, &c. ſhall pay to the party grieved his double coſts and damages, &c. (11) And be it further enacted, that if any perſon or perſons, upon his or their owne head or imagination, or by falſe conſpiration or fraud had with any other, ſhall wittingly, ſubtilly, and falſely forge or make, or wittingly, ſubtilly, and falſely cauſe or aſſent to be made or forged, any falſe charter, deed (12), or writing, to the intent that any perſon, or perſons, ſhall or may have or claime any eſtate or intereſt for terme of yeares (13) of, in, or to any mannors, lands, tenements, or hereditaments, not being coppy-hold (14), or any annuitie (15) in fee-ſimple, fee-taile, or for term of life, lives, or years, or ſhall make or forge, as is aforeſaid, any obligation, or bill obligatory (16), acquittance, releaſe, or diſcharge (18), of any debt, account, action, ſuit, demand, or other thing perſonall, or ſhall pronounce, &c. *ut ſupra.* That then he ſhall pay, &c. (19) 5 Eliz. cap. 14.

And be it further enacted, that if any perſon or perſons being hereafter convicted or condemned of any of the offences aforeſaid, &c. ſhall after any ſuch his or their conviction or condemnation eftſoons commit or perpetrate any of the ſaid of-

fences (20) in forme aforeſaid, that then every ſuch ſecond offence or offences ſhall be adjudged felony, &c.

We have ſpoken of forgery or counterfeiting of the great ſeale of the kings coin, &c. which are declared by the ſtatute of 25 E. 3. to be high treaſon: now we are to treat of forgeries of deeds, charters, and writings ſealed, &c. in the caſe of ſubjects. And firſt, after our accuſtomed manner how theſe offences were puniſhed of ancient time.

Mir. cap. 4. § Des-paines. Et cap. 5. § 1.

The Mirror ſaith, *Aſcuns peches ſont punies p. pde. de poulce, come eſt de faulx notoires, &c.* peccans membrum puniebatur. *(Car pur fauxer de ſeale ne ſerr' judgement mortel.)*

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Britton, fo. 16. a. & b.

Britton ſaith, *Judgement dée treyne, et de ſuffer mort doit encount' ceux coure, q. p. appeales de felony ſont atteints, q. ilz eyent le ſeale lour ſeignior, qui mainpaſt ils ſont, ou q. homes p. homage counterfait, ou autrement fauſe, &c. Et ſi tiels manners des faits ſoient atteints a neſtre ſuit, ſi ſoient pur le ſeale fauſe juges a judgement de pillory, ou de perdre le oraile ſi le fait ſoit ſimple: et ſi le fait ſoit grand et leyde, ſicome touchant diſheriſon ou perpetuall domage, ſi ſoient juges à la mort.*

Fleta, lib. 1. ca. 22.

Fleta ſaith, *Crimen falſi dicitur, cum quis accuſatus fuerit vel appellatus quòd ſigillum regis, vel domini ſui de cujus familia fuerat, falſaverit, et brevia inde conſignaverit; vel cartam aliquam vel literam ad exhæredationem domini, &c. ſigillaverit; in quibus cauſis ſi quis convictus fuerit, detractari meruit et ſuſpendi. Et quod de hujuſmodi falſariis dicitur, de ſi illa adulterina cartis et literis apponentibus dicatur id idem.* And in another place he ſaith, *Eſt etiam atrox injuria quæ perpetuam inducit infamiam cum pœna pillorari vel tumbrelli, quæ quandoque ſit per falſarios ſigillorum (dum tamen non regis nec domini ſui de cujus fuerit familia.)*

Fleta, lib. 2. ca. 1.

We have the more willingly repeated theſe ancient puniſhments, to ſhew how in part, (viz. concerning the eares and pillory,) this act for the firſt offence concurreth with the ancient puniſhment.

(1) *Forge.*] To forge is metaphorically taken from the ſmith, who beateth upon his anvill, and forgeth what faſhion or ſhape he will: the offence (as it appeareth before) is called *crimen falſi*, and the offender *falſarius*, and the Latin word to forge is *falſare* or *fabricare*. And this is properly taken when the act is done in the name of another perſon.

26 H. 6. forger 8. 27 H. 6. 3.

The ſtatute of 1 H. 5. hath theſe words [forge of new any falſe deed.] And yet if A make a feoffement by deed to B, of certaine land, and after A maketh a feoffement by deed to C of the ſame land with an antedate before the feoffement to B; this was adjudged to be a forgery within that ſtatute, and by like reaſon within this ſtatute alſo: and the rather in reſpect of the words ſubſequent, [or make, &c.]

(2) *Or make, &c.*] Theſe be larger words then to forge: for one may make a falſe writing within this act, though it be not forged in the name of another, nor his ſeale nor hand counterfeited. As if A make a true deed of feoffement under his hand and ſeale of the manner of Dale unto B, and B or ſome other raſe out D the firſt letter of Dale, and put in S, and then where the true deed was of the mannor of Dale, now it is falſely altered and made

the mannor of Dale. This is a falſe writing under ſeale within the purview of this ſtatute. And ſo it is if a rent charge of one hundred pounds by the year be granted out of land in fee or for life, &c. and the grantee or any other raſe out one, and in ſtead thereof writeth two; this is a falſe writing within the danger of this ſtatute.

(3) *Or ſubtilly cauſe, or wittingly aſſent.*] To cauſe, is to procure or counſell one to forge, &c. To aſſent, is to give his aſſent or agreement afterwards to the procurement or counſell of another: to conſent, is to agree at the time of the procurement or counſell, and he in law is a procurer.

(4) *Deed, charter, or writing ſealed.*] It is required, that the deed, charter, or writing muſt be ſealed; that is, have ſome impreſſion upon the wax, for *ſigillum eſt cera impreſſa, quia cera ſine impreſſione non eſt ſigillum;* and no deed, charter, or writing, can have the force of a deed without a ſeale.

Paſch. 15 Eliz. Dier. 322 James Taverners caſe. In camera ſtellata.

(5) *Writing ſealed.*] Theſe are large words: for the making of a falſe cuſtomary of a mannor in writing under ſeale, containing divers falſe cuſtomes tending to the diſheriſon of the lord of the mannor, and that the ſame had been allowed and permitted by the lords of the mannor, &c which was alſo falſe, was reſolved to be within theſe words, [a falſe writing ſealed.]

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(6) *Court roll, or the will of any perſon or perſons in writing.*] Here be two kind of muniments that need not be ſealed, becauſe they may take effect without any ſeal, for that they be deeds; as court rols concerning grants, ſurrenders, admittances, &c. of copy or cuſtomary lands: and the laſt will in writing. If any perſon which writeth the will of a ſick man inſerteth a clauſe in his laſt will, concerning the deviſe of any lands or tenements, which he had in fee-ſimple, falſly without any warrant, or direction of the diviſor: albeit he did not forge, or falſly make the whole will, yet is he puniſhable by this ſtatute, as it hath been often holden in the ſtar-chamber againſt the opinion reported by my lord Dier.

Dier 12 El. f. 288. Sir James Marvyns caſe.

(7) *To the intent that the ſtate of freehold or inheritance, of or in any lands, tenements, or hereditaments, freehold or copyhold, ſhall or may be moleſted, troubled, defeated, recovered, or charged*] The great doubt upon this branch, and of the branch hereafter enſuing, was, for that it is not expreſſed by this act, what eſtate, or intereſt ſhould be mentioned to paſſe by the deed, charter, &c. whereby the eſtate of the freehold or inheritance ſhould or might be moleſted, &c. or charged; whether if one did forge, &c. a deed, charter, &c. of an intereſt, or tearm of a hundred or a thouſand years, &c. of lands, which are the freehold or inheritance of another, whereby the ſame ſhall or may be moleſted, &c. And the ſame queſtion of a rent charge for years in the like caſe: and the doubt was the greater in reſpect of the clauſe hereafter enſuing, which is, To the intent that any perſon or perſons ſhall or may have or claim any eſtate or intereſt for tearm of years of in or to any mannors, &c. And it was reſolved, that a leaſe or charge for years of any lands being the freehold or inheritance of any perſon, was within this branch, for the clauſe is generall, not mentioning any eſtate or intereſt, &c. whereby the moleſtation, &c. ſhould grow: and it was requiſite it ſhould extend to leaſes or charges for years, for otherwiſe mens eſtates of freehold or inheritance, &c. might be of little or no value:

Paſch. 38 Eliz. in camera ſtellata the lady Greſhams caſe.

and accordingly it was reſolved, Paſch. 38 Eliz. in the ſtar-chamber between the lady Greſham plaintif, and Roger Booth ſcrivener of London, Markham and others defendants, for the forging of a grant of a rent charge, by deed bearing date *anno* 21 Eliz. for ninety nine years to the ſaid Markham out of all ſir Thomas Greſhams lands of inheritance, and for publication thereof; and ſentence given upon the ſaid branch accordingly againſt Roger Booth for publication of the ſame.

And the ſaid branch after enſuing, is to be underſtood when the forgery, &c. is to the moleſtation of a termor. As if A. be poſſeſſed of a leaſe of lands for years, and B. in his name doth forge an aſſignment to C. of his tearm, this is directly within the letter and meaning of this branch, and the rather in reſpect of thoſe things that be joyned therewith under the ſame puniſhment.

Vide 4 H. 6. 25. 8 H. 6. 33. 20 H. 6. 33 H. 6. 23. 15 E. 4. 24. Pl. com. 88.

(8) *Or the right, title, or intereſt of any perſon or perſons in or to the ſame.*] Theſe words were added, for that the ſtatute of 1 H. 5. being to undoe, and trouble the poſſeſſion and title (in the conjunctive) of the ſaid kings liege people: doubt was made whether a forgery to bar one that had but a bare right or title, and no poſſeſſion, was within that ſtatute: and therefore this clauſe of 5 Eliz. added this clauſe in the disjunctive, as here it appeareth. But now by a ſpeciall branch of this act the ſtatute of 1 H. 5. cap. 3. being doubtfully penned, is repealed by a clauſe in this act, and greater puniſhment inflicted by this ſtatute.

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(9) *Or ſhall pronounce, publiſh, or ſhew forth in evidence any ſuch falſe and forged deed, &c. as true knowing the ſame to be forged.*] Here be two things to be explained: firſt, what it is to pronounce, or publiſh as true. Secondly, what knowledge is ſufficient.

To pronounce or publiſh is, when one by words or writing pronounceth or publiſheth the deed, &c. to any other as true.

(10) *Knowing the ſame to be forged.*] This knowledge may come by two means, either of his own knowledge, or by the relation of another. As if A. telleth B. that ſuch deed is falſe and forged, and yet B. will after pronounce or publiſh this to be a true deed, and afterwards it falleth out by proof that the relation of A. was true, and the deed in truth was forged, B. is in the danger of this ſtatute: and ſo was it reſolved in the aboveſaid caſe of the lady Greſham, againſt Roger Booth, &c. *ubi ſupra*, and ſentence given accordingly.

Dier 15 Eliz. Taverners caſe, ubi ſupra.

(11) *And that the defendant ſhall ſuffer upon the pillory the corporall penance, &c.*] And there is a clauſe that the plaintif ſhould not releaſe nor diſcontinue the puniſhment, &c. but only coſts and damages: and yet it was reſolved that the queen might pardon the corporall puniſhment, which trencheth to common example.

Paſch. 34 E. 3. Coram rege, Rot. 30. Kanc' the caſe of Godiſtha Waldiſh. Dier 7 El. 231.

And upon the ſtatute of W. 2. ca. 25. which giveth two years impriſonment in the raviſhment of ward, the king may pardon the ſaid corporall puniſhment of impriſonment. And the puniſhment of finding of ſurety, and forjuring the realm, &c. upon the ſtatute of W. 2. cap. 28. *De malefactoribus in parcis* may be pardoned by the king.

(12) *Any falſe charter or deed.*] This muſt be intended to be ſealed according to the former clauſe, though it be not here ſpecified.

Pl. com. 80. b.

(13) *To the intent that any perſon or perſons ſhall or may have or claim any*

any eſtate or intereſt for tearm of years.] This branch hath been explained before in the former part of this ſtatute.

(14) *Not being copy hold.*] This needeth no explication.

(15) *Or annuity.*] This is evident.

(16) *Any obligation, or bill obligatory.*] Theſe muſt be intended to be ſealed: if a man forge a ſtatute ſtaple, or a recogniſance in the nature of a ſtatute ſtaple, that is, acknowledge them, or either of them in the name of another; theſe are obligations within this act, for each of them hath the ſeal of the party. But otherwiſe it is of a ſtatute merchant, or of a recogniſance, becauſe they have not the ſeal of the conuſor. F. N.B. 96. b. c. & 10. a. 15 H. 7. 15, &c.

(17) *Or writing.*] This extends to a teſtament in writing, whereby the tearm for years or goods and chattels be deviſed, and the former branch extendeth to a will in writing, concerning freehold and inheritance. Dier, 13 Eliz. 302. b.

(18) *Acquitance, releaſe or diſcharge.*] Lodowick Grevil eſquire was bound by recogniſance of two hundred pound, to Rowland Hinde of the Inner Temple, for payment of one hundred pound. Hinde wrote a letter to Grevil, and writ his name in the loweſt part of the letter; (as many uſe when they write to men of great calling) Grevil cauſed the letter to be cut off, and a generall releaſe in few words to be written above Hindes name, and took off Hindes ſeal, and fixed it under the releaſe: ſo there was Hindes hand and ſeal to this releaſe. Hinde being not paid his hundred pound, brought a *ſcire fac'* upon the recogniſance, whereunto Grevill pleaded this releaſe, Hinde pleaded *non eſt factum*, and tried his deed, whereupon judgement was given againſt him, whereby Hinde was barred of his debt. For this forged releaſe Grevil was ſentenced in the ſtar-chamber upon this ſtatute. Mich. 13 & 14 El. in camera ſtellata inter Hinde and Grevill. [172]

(19) *Shall pay to the party grieved, his double damages.*] Upon theſe words in the caſe aforeſaid, between Hinde and Grevill, the queſtion was, whether Hinde ſhould have double damages in reſpect of the penalty, viz. the two hundred pound, or of the hundred pound, the due debt appearing in the condition of the recogniſance. And it was reſolved, that damages ſhould be aſſeſſed by the court to double the penalty, for the penalty ſhould be recovered by law if the forged releaſe had not been: and this was reported by the lord Dier, and imprinted, and ſince omitted out of the print.

(20) *Being hereafter convicted or condemned of any of the offences aforeſaid, ſhall, &c. eſtſoons commit, &c. any of the ſaid offences.*] Here be four kind of offences; the firſt concerning moleſtation, &c. of freehold and inheritance. Secondly, the publication of the ſame knowing, &c. The third concerning a tearm for years, annuities, and demands perſonals. Fourthly, the publication thereof.

Now the queſtion upon this branch concerning felony, was, that whereas the ſaid Roger Booth was convicted in the ſtar-chamber for the publiſhing of the forged grant by deed of a rent charge of a hundred pound *per annum*, as is aforeſaid; afterwards the ſaid Roger and others were charged in the ſtar-chamber with the forging of a deed of feoffment in the name of ſir Thomas Greſham bearing date 20 Eliz. but forged long after: whether this ſecond forgery was felony, or no within this branch; and the doubt did ariſe upon the ſaid words [*eſtſoons*] commit any of the ſaid offences. And it Paſch. 7 Ja. Inter ſir Will. Reade pl. and Rogerum Booth et alios def. in camera ſtellata.

was

was objected, that by reaſon of this word [*eſtſoons*] *iterum*, the ſecond offence muſt be of the ſame nature as the firſt offence was; as the firſt offence being for publication of a forged deed, &c. the ſecond offence muſt be for the publication of another forged deed, &c. and upon that branch whereupon the firſt offence was grounded, or elſe it was ſaid, it was not *iterum*, which word was in ſignification *quaſi iter unum*, that is to ſay, *per idem iter*, and it is ſo taken for the ſecond time. *Primo quidem deciſi, incommodum eſt, iterum ſtultum, tertio turpe:* which doubt was referred to the conſiderations of the two chief juſtices, and chief baron, who upon hearing of councell learned of both ſides, and upon conference, and conſideration had of this act, reſolved, that the ſecond offence was felony within the words, and meaning of this act, for the words be expreſly, being condemned of any of the ſaid offences, eſtſoons commit any of the ſaid offences. So as by reaſon of theſe words, any of the ſaid offences, this word [*eſtſoons*] is well ſatisfied, if he commit the ſecond time any of them: and ſo theſe words any of the ſaid offences extend to any of the ſaid four offences before mentioned. And it was alſo reſolved by them, that by reaſon of this word [eſtſoons] the ſecond forgery, &c. muſt be committed after the firſt conviction, or elſe it is no felony.

Cicero, lib. 2 de Invent.

Provided always, &c. that if any perſon, &c. hath of his own head, &c. forged or made, &c. or if any perſon, &c. hath heretofore publiſhed or ſhewed forth any falſe deed, &c.

Trin. 11 El. Dier in a manuſcript not printed.

Hanford before this ſtatute forged a leaſe for years of the land of the lord Williams of Tame, which leaſe after by Weynman (which hath married one of the daughters and heirs of the ſaid lord Williams) was impeached, but not as forged, and by compoſition for two hundred pound was redeemed by Weynman, and the leaſe was cancelled. And after Weynman perceiving the leaſe to be forged, ſued Hanford in the chancery to have reſtitution of the two hundred pound, and there Hanford after this ſtatute of 5 Eliz. maintained the leaſe as good and true: whereupon Weynman ſued Hanford in the ſtar-chamber, where by the opinion of the chief juſtices it was holden, that it was not within this ſtatute; becauſe that the deed was cancelled, and Hanford made no title to the intereſt of the tearm.

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Provided always, &c. that this act or any thing therein contained, ſhall not extend to any perſon that ſhall plead or ſhew forth any deed or writing exemplified under the great ſeal of England, or under the ſeal of any other authentique court of this realm, nor ſhall extend to any judge or juſtice, or other perſon that ſhall cauſe any ſeal of any court to be ſet to ſuch deed, charter or writing enrolled, not knowing the ſame to be falſe or forged.

Mich. 10 Jacobi regis in communi banco in a prohibition between Tho. Read pl. and Avis Hide, and Rich. Hide defendants.

This muſt be intended of a deed or writing, which by law may be exemplified: for the knowledge whereof we will report a reſolution of the whole court of the common pleas. The iſſue between the ſaid parties to be tried at the bar was, whether the laſt abbot of Abbingdon, and all his predeceſſors, &c. held certain lands in the

pariſh of Saint Hens, &c. diſcharged of the payment of tithes: and the plaintif offered to ſhew in evidence to prove the ſaid land to be diſcharged of payment of tithes, a *vidimus*, or *innoteſcimus* under the great ſeal in theſe words: *Vidimus quendam antiquum librum in pergameno intitulatum volumen de copiis munimentorum ſeu diverſorum geſtorum, et actorum monaſterii de Abbingdon.* In which book was a copy of a bull of the pope, for the diſcharge of the ſaid land for payment of tithes, which was but part (amongſt other things) of the ſaid book. And by the opinion of the whole court, hearing of the counſell of both parties, it was reſolved that the ſaid exemplification ought not to be given in evidence to the jury for theſe cauſes: firſt, becauſe that which was exemplified, was not of record; for neither deed, charter, or other writing, either ſealed, or without ſeal, ought to be exemplified under the great ſeale, or any other ſeal in court of record, for ſeals of courts of record ought not to exemplifie any thing but that which is of record, becauſe records be publique, whereunto every ſubject may have recourſe to confer the exemplification with the record itſelf, and records be in the cuſtody of ſworn officers, and therefore no inconvenience can follow upon the exemplification or them. But a deed, charter, and other writings are private, and remain in the cuſtody of the party, and may be raſed, interlined, or corrupted in points materiall, and if they ſhould be exemplified, the raſure, interlineation, and corruption ſhall not appear therein. Alſo the deed, charter, or other writing may be forged, and if they ſhould be exemplified, then the exemplification might ever be ſhewed in evidence, and not the deed, &c. it ſelf, and ſo the forgery, and falſity ſhould never upon the view of the deed, or of the ſeal, or other things riſing upon the view, be diſcovered. Moreover if a forged deed ſhould be exemplified, then the effect of this ſtatute concerning publication ſhould be taken away; for then the forged deed, &c. it ſelf might never be publiſhed, or given in evidence, but the exemplification, and ſo this ſtatute in that point deluded: and therefore where this ſtatute, or any other ſtatute or booke ſpeaks of an exemplification, *vidimus* or *innoteſcimus* of a deed, &c. it muſt be intended of a deed inrolled, viz. the exemplification, *vidimus*, or *innoteſcimus* of the inrolment thereof, which is of record. It was further reſolved that no record, or inrolment of any record, may be exemplified under the great ſeale, but of a record of the court of chancery, or other record duly removed thither by *certiorari*, &c. Furthermore it was reſolved, that no exemplification ought to be of any part of a letters patents, or of any other record, or of the inrolment thereof, but the whole record or the inrolment thereof ought to be exemplified, ſo that the whole truth may appeare, and not of ſuch part, as makes for the one party and nothing that make againſt him, or that manifeſteth the truth. Laſtly, in the caſe at the barre, the ſaid book was intituled, *Volumen de copiis munimentorum, et diverſorum geſtorum.* So as ſeeing the bull itſelfe (being no matter of record) could not be exemplified; *à fortiori*, no exemplification could be had of the copie of the ſame. And if bulls, &c. might be exemplified, then there might be an evaſion to make the ſtatute of 28 H. 8. cap. 16. of ſmall force, which prohibiteth pleading, or alledging of bulls, &c. under paine of a premunire, as by that act appeareth.

Mich. 29 & 30 Eliz. lib. 5. fo. 54. in Pages caſe.

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28 H. 8. cap. 16. 1 & 2 Ph. & Mar. cap. 8. 1 Eliz. cap. 1.

CAP.

CAP. LXXVI.

Of Libels and Libellers.

WHAT a libell is, how many kindes of libels there be, who are to be punished for the same, and in what manner, you may read in my reports, viz. Lib. 5. fo. 124, 125. Lib. 9. fo. 59. To these you may add two notable records. By the one it appeareth, that Adam de Ravensworth was indicted in the kings bench for the making of a libel in writing, in the French tongue; against Richard of Snowshall, calling him therein, *Roy de Raveners, &c.* Whereupon he being arraigned, pleaded thereunto not guilty, and was found guilty, as by the record appeareth. So as a libeller, or a publisher of a libell committeth a publick offence, and may be indicted therefore at the common law.

Mich. 10 E. 3. coram rege. Rot. 92. Eboracum.

John de Northampton an attorney of the kings bench, wrote a letter to John Ferrers one of the kings councell, that neither Sir William Scot chiefe justice, nor his fellowes the kings justices, nor their clerks, any great thing would do by the commandement of our lord the king, nor of queen Philip, in that place, more then of any other of the realme; which said John being called, confessed the said letter by him to be written with his own proper hand. *Judicium Curiæ. Et quia prædictus Johannes cognovit dictam literam per se scriptam Roberto de Ferrers, qui est de concilio regis, quæ litera continet in se nullam veritatem: prætextu cujus dominus rex erga curiam et justiciarios suos hic in casu habere posset indignationem, quod esset in scandalum justic' et curiæ. Ideo dictus Johannes committitur maresc' et postea invenit 6 manucaptores pro bono gestu.*

Mic. 18 E. 3. coram rege Rot. 151. Libellum.

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CAP. LXXVII.

Of Champerty, Imbracery, Maintenance, &c.

SEE the first part of the Instit. sect. 701. verb. Maintenance. And the second part of the Institutes, W. 1. cap. 8. 32. & W. 2. cap. 49. and the exposition upon the same. See also the statute of 32 H. 8. cap. 9. in the first part of the Institutes, *ubi supra.* Rot. Parl. 17 R. 2. nu. 10. John de Winsors case. And the fourth part of the Institutes, cap. Chancery. Whereunto you may adde, that where by the statute of 6 H. 6. cap. 2. it is recited, that divers in times past have been disherited, because that in speciall assises the tenant and defendant might not have knowledge nor copie of the pannel of them that be impannelled to passe in the said assises, to inform them of their right and title before the day of the session that the assises shall be demanded; which is a rehearsall of the common

mon law, but ſo to be underſtood, that both parties plaintiffe and tenant, &c. be preſent, when ſuch information is given, and conſenting thereunto: otherwiſe, if one of them informeth in the abſence of another, it is unlawfull, and a good cauſe of challenge of ſuch of the jury as ſhall be ſo on the one part informed: for every jury muſt be indifferent, as he ſtand unſworne.

CAP. LXXVIII.

Of Barretry.

SEE the firſt part of the Inſtitutes, ſect. 701. verb. Barretors. See the ſtatute of Ragman, temps E. 1. whereby the commiſſion of Trailebaſton is raiſed. It is thus provided. *Et pur ceo q. en tiels maners de quereles doit le court le roy eē favourable, voet le roy, et enjoint' les juſtices q. nul enquerelant, ne reſpoignant ne ſoit ſurpriſe nencheſon per hockettours, ou barrettours, pou. que le veritie ne ſoit enſue.* Vet. Mag. Cart. cap. 28. 2 part.

Hockettors or *hocquetours* is an ancient French word for a knight of the poſt, (worthy to be knit to a poſt) a decayed man, a baſket-carrier.

For barrettors, ſee the firſt part of the Inſtitutes, *ubi ſupra.*

CAP. LXXIX.* [176]

Of Riots, Routs, Unlawful Aſſemblies, Forces, &c.

RIOTUM commeth of the French word, *rioter, i. rixari:* and in the common law ſignifieth, when three or more doe any unlawfull act, as to beat any man, or to hunt in his park, chaſe, or warren, or to enter or take poſſeſſion of another mans land, or to cut or deſtroy his corne, graſſe, or other profit, &c.

* *Routa* is derived of the French word *rout*, and properly in law ſignifieth, when three or more do any unlawfull act for their own, or the common quarrell, &c. As when commoners break down hedges or pales, or caſt down ditches, or inhabitants for a way claimed by them, or the like.

* Latine Turba. —*comes eſt diſcordia vulgi; Namq; a turbando nomen ſibi turba recepit.* Lamb. int. Leg. Inæ ca. 13, 14, 15. Vide Alvered. cap. 26.

An unlawfull aſſembly is when three or more aſſemble themſelves together to commit a riot or rout, and doe it not. *Prædones autem nominamus uſq; numerum ſeptem virorum; deinde (quouſq; numerus coaluerit) * turmam (Saxonicè hloth) dicimus; numerus ſi excreverit, exercitum vocamus, hlothbota,* to be quit of unlawfull aſſemblies.

* Turma quaſi tordena.

One may commit a force. But of this, that I may not unprofitably repeat, you may reade at large Fitzherbert, and thoſe others that have written of this argument.

Intereſt

Regula. *Interest regi habere subditos pacatos. Vis legibus est inimica.* See Lib. 5. fo. 91.-115. Lib. 11. fo. 82. See the first part of the Institutes, sect. 431. 440. Custum. de Norm. cap. 52. fo. 66, 67.

CAP. LXXX.

Of Quarrelling, Chiding, or Brawling by Words in Church or Church-yard.

5 E. 6. cap. 4. THE offender being a lay-man, is to be suspended by the ordinary *ab ingressu ecclesiæ*, and being a clerk from the ministration of his office, so long as the ordinary thinks meet according to the fault.

CAP. LXXXI.

[177] ### Of Smiting, or laying violent Hands upon another in Church or Churchyard.

5 E. 6. ubi supra. V. lib. 6. fo. 29. b. Grenes case, fin. THE offender shall be deemed *ipso facto* excommunicat, and excluded from the company of Christs congregation.

CAP. LXXXII.

Of malicious striking with any Weapon, or drawing of any Weapon in Church or Churchyard, to the intent to strike another, &c.

5 E. 6. ubi sup. * Note the disjunctive. Int. leg. Inæ. ca. 6. Qui in templo pugnaverit 120 solidis noxiam facito. Dier 23 Eliz. 177. case ultim. THE offender being convict by the oath of twelve men, or by his own confession, * or by two lawfull witnesses, before justices of assise, justices of oier and terminer, or justices of peace in their sessions, shall lose one of his eares: and if he hath no eares, to be marked in the cheek with a hot iron with the letter F, and *ipso facto* be excommunicate.

CAP.

CAP. LXXXIII.

For ſtriking, &c. in any of the Kings Courts of Juſtice: and for ſtriking, &c. in any of the Kings Houſes, &c.

SEE before in the ſixty fifth chapter of Miſpriſion, that is, *crimen commiſſionis.*

CAP. LXXXIV. [178]

Againſt Fugitives, or ſuch as depart out of the Realme without Licenſe, and ſuch as are beyond Sea, and returne not upon Command.

Omne ſolum forti patria eſt, ut piſcibus æquor,
Et volucri, vacuo quicquid in orbe patet. Ovidius.

IT is firſt to be ſeen of acts in parliament publiſhed in print, which of them are abrogated and repealed, and which of them ſtand in force. The ſtatute of 5 R. 2. cap. 2. is repealed by the ſtatute of 4 Jac. cap. 1. And the ſtatutes of 13 Eliz. cap. 3. & 14 Eliz. cap. 6. are expired. The ſtatute of 12 R. 2. ſuch as paſſe the ſea, or ſend out of the realme to provide or purchaſe any benefice of holy church, with cure or without cure, are in danger of a premunire. No perſon reſiant within any of the kings dominions, ſhall depart out of any of thoſe dominions, to any viſitation, congregation, or aſſembly for religion.* 12 R. 2. ca. 15. 25 H. 8. cap. 19. 1 Eliz. c. 1. revive.

Anno 1 Jac. cap. 4. and 3 Jac. cap. 5. Againſt going or ſending of children to any ſeminary beyond ſea, and againſt the departure out of the realme (without licenſe) of any children not being ſouldiers, mariners, merchants, or other apprentiſes, or factors, for any cauſe whatſoever. And *anno* 3 Ja. ca. 4. againſt impoſing felony upon any ſubject that ſhall depart this realme, to ſerve any prince, ſtate, or potentate: or ſhall paſſe over the ſeas, and there ſhall voluntarily ſerve any ſuch foraine prince, ſtate, or potentate; not having before his or their going or paſſing, taken the oath mentioned in that act. And likewiſe impoſing felony upon any gentleman or perſon of higher degree, or any perſon which hath borne or ſhall beare any office, or place of captaine, lieutenant, or any other place, charge, or office in campe, army, or company of ſouldiers, or conducter of ſouldiers, that ſhall goe, or paſſe voluntarily out of this realme, to ſerve any ſuch foraine prince, ſtate, or potentate, 1 Jac. cap. 4. 3 Jac. cap. 5.

or

or ſhall voluntarily ſerve any ſuch foraine prince, ſtate, or potentate, before he be bound by obligation with two ſureties, as in that act is preſcribed. But it is provided that upon the attainder of any ſuch felony, no forfeiture of dower or corruption of blood ſhall enſue. Reade over theſe ſtatutes, for they are ſo plainly penned, as they need no expoſition.

Next unto this, two things fall into conſideration, firſt, what acts of parliament not publiſhed in print in our books of ſtatutes do prohibit men to paſſe the ſeas without licenſe. And ſecondly, what may be done therein by the common law of England.

At the parliament holden at Clarendon, *anno* 10 H. 2. called the aſſiſe of Clarendon, *Facta eſt recognitio cujuſdam partis conſuetudinum et libertatum anteceſſorum regis, et ca. 4. ſic recognitum eſt. Archiepiſcopis, epiſcopis, et perſonis regni non licet exire regnum abſque licentia domini regis, et ſi exierint, ſi regi placuerit, ſecurum eum facient, quòd nec in eundo nec in redeundo, nec moram faciendo perquirent malum ſeu damnum domino regi vel regno.*

This appeareth in it ſelfe to be but a recognition, or declaration of the common law: and this is manifeſtly proved by the writ in the Regiſter at the common law, purſuing in effect the very words of the ſaid act of 10 H. 2. *Breve de ſecuritate invenienda, quod ſe non divertat ad partes exteras ſine licentia regis.*

Regiſt. fo. 89, 90. F. N. B. 85.

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And hereupon there ariſeth a diverſity between one of the clergie, and one of the laity: for a man of the church may be compelled to put in ſurety, that he ſhould not depart the realme without the kings licenſe, nor ſhall there attempt any thing in contempt or prejudice of the king or of his people. And this writ is directed to the ſheriffe, and ſaith, *Quia datum eſt nobis intelligi, quòd A. B. clericus verſus partes exteras ad quam plura nobis et quam pluribus de populo noſtro præjudicialia et damnoſa ibid. proſequend., &c.* Whereby it appeareth, that this writ lyeth only in the caſe of an eccleſiaſticall perſon, or a man of the church, and that for three reaſons. Firſt, for that they had the cure of ſoules, and therefore ought to be reſident. Secondly, for that they, maintaining foraine authority, impugned many of the kings lawes, to the great prejudice of the laity. Thirdly, they had no temporall lands, therefore they found ſureties.

Vide ſimile Regiſt. 61, &c. Ad jura regia. Regiſt. fo. 193. De licentia transfretandi pro religioſis.

[a] There is another writ in the [a] Regiſter, and that is to be directed to the party himſelfe, viz. either to the clerk, or to the layman, wherein the king reciting, *Quod datum eſt nobis intelligi, quòd tu verſ. partes exteras abſque licentia noſtra, clandeſtine te divertere, et* [b] *quamplurima nobis et coronæ noſtræ prejudicialia ibid. proſequi intendas, &c. ſub periculo quod incumbit prohibemus, ne verſ. partes exteras abſque licentia noſtra ſpeciali aliqualiter te divertas, nec quicquam ibid. proſequi, &c.* And upon this writ the party is not to finde any ſurety, for there is no word of ſurety in this writ. And if the [c] ſubject cannot be found, the king may make a proclamation under the great ſeale, to the effect of the writ laſt mentioned.

[a] Regiſt. 89. 90. F. N. B. fo. 85.

[b] So as neither this writ, nor a proclamation in nature of this writ ought to be granted, but where the party intends to depart the realme for theſe ends.

[c] F. N. B. fo. 85. b. Vide Dier 1 Eliz. 165. b.

Now let us peruſe ſuch authorities as we finde in records or books of law *in ſerie temporis*, taking ſome few examples for many that might be cited.

[d] *Willielmus Marmion clericus profectus eſt ad regem Franciæ ſine licentia domini regis, et propterea finem fecit, &c.* Note the going over without any prohibition precedent unlawfull.

[d] Rot. Finium 6 H. 3. Et Rot. clauſ. 7 H. 3. m. 5.

Nul

[c] *Nul grand Seignior où chivalier de noſtra realm ne doit prender chemin (daler hors [de] realm) ſans noſtre conge, car iſſint parroit le realm remain diſgorgne de fort gents.* And the [f] nobles and peers of the realm are of the kings great councel.

By this it appeareth, that theſe are prohibited to goe beyond ſea without licence; but others of the inferiour laity may go without licenſe, if they travell not to the aboveſaid prohibited ends. But [g] thoſe of the laity and men of the church alſo being beyond ſea, may be commanded by the kings writ, either under the great ſeale, or privie ſeale, *in fide et ligeantia, &c.* to returne into the kingdome (though he be not there to any of the aboveſaid prohibited ends;) and if he returne not, for his contempt his lands and goods ſhall be ſeiſed, *quouſque, &c.* [h] Commandement was given to an eccleſiaſticall perſon reſiding at Rome to returne into England.

[i] *Quamplurimæ literæ domini regis miſſæ Romæ, ad revocand' diverſos clericos ibid. commorantes, qui quamplurima attemptarunt in dedecus regni, præcipient' etiam, quòd redeant ad feſtum eis appunctuatum: et pro eo quòd non venerunt, præceptum fuit vicecomiti quod eos capiat. Et Rogerus de Holme præbendarius in eccleſia Sancti Pauli London captus per vic' London, et arraynatus, examinatus, et convictus mittitur priſonæ turris London ibid. moraturus, &c.*

[k] *Rex proclamari fecit in omnibus comitatibus Angliæ, quòd ne quis comes, baro, miles, religioſus, ſagittarius, aut opera ius, &c. extra regnum ſe transferat, ſub pœna arreſtationis, et incarcerationis.*

Herein it is to be obſerved, that ſeeing by law, no earle, baron, or knight (as Britton ſaith) nor religious, &c. ought to goe out of the realme, a generall proclamation declarative will ſerve to aggravate their offence: but otherwiſe it is of thoſe, that are not prohibited by law, they muſt have ſuch a particular writ or proclamation as is aboveſaid.

[l] Sir Matthew Gourny knight was prohibited by the kings writ to depart the realm, and to ſerve in wars expreſly inhibited by the king: which notwithſtanding he did. Now the record ſaith, *Quia Mathæus Gourny miles contra defenſionem regis transfretavit, et ſe guerris ſibi per regem inhibitis immiſcuit, tam in corpore, quam in bonis* [m] *forisfecit regi manerium de Corimallet ſimul cum una carucat' terræ, &c.*

[a] *Rex † licentiam dedit abbati de E. quòd proficiſci poſſit ultra mare ad viſitandum caput Sancti Johannis Baptiſtæ Ambiani, corpora trium regum Coloniæ, feretrum Sancti Franciſci in et Sanctum Jacobum in Galicia, ita quod non proſequetur, aut procurabit quicquam in præjudicium regis, aut * legum ſuarum, ſicut idem abbas in præſentia cancellarii regis per juramentum promiſit.*

Note that eccleſiaſticall perſons could not goe beyond ſea on pilgrimage without licence, nor to doe any thing in prejudice of the king, or his laws.

[b] And it is to be obſerved that the king may grant licence to travail beyond the ſeas, either under the great ſeal, privy ſeal, or privy ſignet, but he cannot recall one that is beyond ſea, but by the great ſeale, or privy ſeal.

But for avoiding of tedioufneſſe, and heaping many to one end, let us deſcend to later times.

[c] The letters under the great ſeal, or privy ſeal to recall any from beyond ſea, ought to be ſerved by ſome [d] meſſenger, who upon his oath is to make a certificate thereof in the chancery, and from thence

[c] Britton temps E. 1. fo. 282, 283. Vide leſtatut. de 5 R. 2. ca. 2. Seigniors except out of that ſtatute.

[f] See the firſt part of the Inſtit. ſect. 164. f. 110. a. 27 Auguſt 5 H. 4. De ſon grand counceil.

[g] An. 19 E. 2. in Scac. 2 & 3 Ph. & Mar. Dier, 128. pl. 61. Wil. de Britaine countee de Richmonds caſe.

[h] Rot. clauſ. 4 E. 3. m. 38.

[i] H l. 24 E. 3. coram rege, Rot. 13.

[k] Dorſ. clauſ. 25 E. 3. m. 18.

[l] Mic. 39 E. 3. coram rege. Rot. 97. Somerſ. Rot. Vaſc. 10 E. 3. m. 29.

[m] By ſeiſure and impriſonment.

[a] Rot. pat. 40 E. pt. 1. nu. 40. Mich. 41 E. 3. Coram rege Rot. 34. Prioriſſa Sancti Barth. et de novo caſtro quod mare non tranſibit, &c.

† [180]

* Nota (legum ſuarum) ut ſupra.

[b] F. N. B. 85. f.

[c] Dier Hil. 2 Eliz. 176. the caſe of Barton and the dutches of Suffolk.

[d] See 10 H. 4. 5. Englefields caſe. Lib. 7. fo. 11. See the 1. part of the Inſtitutes ſect. 102.

thence a *mittimus* to be ſent into the exchequer, and thereupon a commiſſion to be granted to ſeiſe the lands and goods of the delinquent.

[c] Mich. 12 & 13 El. Dier, fo. 296. & Paſc. 23 Eliz. fo. 375.

[c] Mich. 12 & 13 Eliz. It was reſolved by all the juſtices (except two) that a merchant of London departing the realm, to the intent to live freely from the penalty of the law, and out of his due obedience to the queen, and not for any merchandiſe, that it was no contempt to the queen, for merchants were excepted out of the ſaid ſtatute of 5 R. 2. cap. 2. and by the common law merchants might paſſe the ſea without licence, though it were not to merchandize.

It is holden, and ſo it hath been reſolved, that divided kingdomes under ſeverall kings in league one with another are ſanctuaries for ſervants or ſubjects flying for ſafety from one kingdome to another, and upon demand made by them, are not by the laws and liberties of kingdomes to be delivered: and this (ſome hold) is grounded upon the law in Deuteronomy. *Non trades ſervum domino ſuo, qui ad te confugerit.*

Deut. c. 23. v. 15.

When queen Elizabeths ambaſſadour lieger in France, *anno* 34 of her reign, demanded of the French king Morgan and others of her ſubjects, that had committed treaſon againſt her; the anſwer of the French king to the queens ambaſſadour is truly related in theſe words. *Si quid in Gallia machinarentur, regem ex jure in illos animadverſurum; ſin in Anglia quid machinati fuerint, regem non poſſe de eiſdem cognoſcere, et ex jure agere. Omnia regna profugis eſſe libera, regum intereſſe, ut ſui quiſque regni libertates tueatur. Immo Elizabetham non ita pridem in ſuum regnum Mountgomerium, principem Condæum, et alios è gente Gallica admiſiſſe, &c.* and ſo it reſted.

Camden Elizab. pa. 355.

King H. 8. in the 28 year of his reign being in league with the French king, and in enmity with the pope, who was in league with the French king, ſent Cardinall Pool ambaſſadour to the French king, of whom king H. 8. demanded the ſaid Cardinall being his ſubject and attainted of treaſon, and to that end cauſed a treatiſe to be made (which I have ſeen) that ſo it ought to be done *jure gentium: ſed non prævaluit.* But Ferdinando king of Spain upon requeſt made by H. 7. to have Edmond de la Pool earl of Suffolk attainted of high treaſon by parliament, *anno* 19 H. 7. at the firſt intending to obſerve the privilege and liberty of kings, to protect ſuch as came to him for ſuccour, and protection, delivered him not, yet in the end upon the earneſt requeſt of H. 7. and promiſe that he would not put him to death, cauſed the ſaid earl to be delivered unto him, who kept him in priſon, and conſtruing his promiſe to be perſonall to himſelf, commanded his ſon Henry after his deceaſe to execute him, who in the fifth year of his reign upon cold blood performed the ſame.

An. 21 H. 7. Rot. parl. 19 H. 7.

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We could add more examples of this kind, but (to ſpeak once for all) having purpoſed to give ſome taſte of every thing pertinent, or incident to ſuch things, as we have undertaken to treat of, theſe ſhall ſuffice.

3 Car. ca. 2.

See the ſtatute of 3 Car. an act to reſtrain the paſſing and ſending of any to be popiſhly bred beyond the ſeas.

* Mich. 10 H. 4. Coram rege, Rot. 59. Hertford.

* *Flemenesfreme, ſive flemenesfrenthe, interpretatur, catalla fugitivorum.*

CAP.

CAP. LXXXV.

Againſt Monopoliſts, Propounders, and Projectors.

IT appeareth [a] by the preamble of this act (as a judgement in parliament) that all grants of monopolies are againſt the ancient and fundamentall laws of this kingdome, and therefore it is neceſſary to define what a monopoly is.

[a] The ſtatute of 21 Jac. ca. 3. Rom. 1. 30. Inventores malorum.

[b] A monopoly is an inſtitution, or allowance by the king by his grant, commiſſion, or otherwiſe to any perſon or perſons, bodies politique, or corporate, of or for the ſole buying, ſelling, making, working, or uſing of any thing, whereby any perſon or perſons, bodies politique, or corporate, are ſought to be reſtrained of any freedome, or liberty that they had before, or hindred in their lawfull trade.

[b] A monopoly deſcribed. See the expoſition upon Magna Carta, c. 29. & 30. in the ſecond pt. of the Inſtit.

[c] For the word monopoly, *dicitur, ἀπὸ τοῦ μόνου*, i. *ſolo, καὶ πωλέομαι*, i. *vendere, quod eſt, cum unus ſolus aliquod genus mercaturæ univerſum vendit, ut ſolus vendat, pretium ad ſuum libitum ſtatuens:* hereof you may read more at large in that caſe. And the law of the realm in this point is grounded upon the law of God, which ſaith, *Non accipies loco pignoris inferiorem et ſuperiorem molam, quia animam ſuam appoſuit tibi.* Thou ſhalt not take the nether or upper milſtone to pledge, for he taketh a mans life to pledge: whereby it appeareth that a mans trade is accounted his life, becauſe it maintaineth his life; and therefore the monopoliſt that taketh away a mans trade, taketh away his life, and therefore is ſo much the more odious, becauſe he is *vir ſanguinis*. Againſt theſe inventers and propounders of evill things, the Holy Ghoſt hath ſpoken, *inventores malorum, &c. digni ſunt morte.*

[c] Trin. 44 Eliz. lib. 11. f. 84, 85. le caſe de Monopolies.

Deut. ca. 24. v. 6.

Rom. 1. 30.

That monopolies are againſt the ancient and fundamentall laws of the realm (as it is declared by this act) and that the monopoliſt was in times paſt, and is much more now puniſhable, for obtaining and procuring of them, we will demonſtrate it by reaſon, and prove it by authority.

Commercium jure gentium commune eſſe debet, et non in monopolium, et privatum pauculorum queſtum convertendum. Iniquum eſt alios permittere, alios inhibere mercaturam. 11 H. 7. 11.

Whatſoever offence is contrary to the ancient and fundamentall laws of the realm, is puniſhable by law: but the uſe of a monopoly is contrary to the ancient and fundamentall laws of the realme, therefore the uſe of a monopoly is puniſhable by law.

That offence which is contrary to the ancient and fundamentall laws is *malum in ſe.* The minor is proved by this declaration in parliament.

The liberty that the ſubject hath to goe to any clerk in the kings court cannot be reſtrained but by parliament.

W. 1. cap. 27.

In 50 E. 3. John Peachie of London was ſeverely puniſhed for procuring a licence under the great ſeal, that he only might ſell ſweet wines in London,

Rot. par. 50 E. 3. nu. 33.

See in the preambles of 9 E. 3. cap. 1. 25 E. 3. cap. 2. 27 E. 3. & 28 E. 3. Stat. Strap. 2 R. 2. ca. 1. See the ſtatute of Magna Cart. ca. 3. 31 E. 3. cap. 10. 7 H. 4. cap. 9. and 12 H. 7. ca. 6.

1 & 2 Ph. & Mar. ca. 14. Rot. Parl. 1 R. 2. nu. 25. 4 R. 2. nu. 39. 5 R. 2. nu. 89. Forteſcue, cap. 35, 36. One of the articles wherewith William de la Pool duke of Suffolk was charged, was for procuring of divers liberties in derogation of the common law, and hindrance of juſtice: note this is an offence puniſhable.

Rot. Parl. 28 H. 6. nu. 30.

[182] King Philip and queen Mary by their letters patents granted to the maior, bailifs and burgeſſes of Southampton and their ſucceſſors, (for that king Philip firſt landed there) that no wines called malmſies, brought into this realm from the parts beyond the ſeas by any liege man or alien, ſhould be diſcharged or landed in any other place of the realm, but only at the ſaid town and port of Southampton, with a prohibition, that no perſon or perſons ſhall doe otherwiſe, upon paine to pay treble cuſtome: and it was reſolved by all the judges of England that this grant made in reſtraint of the landing of the ſame wines was againſt the laws and ſtatutes of this realme, viz. Magna Carta, 29, 30. 9 E. 3. cap. 1. 14 E. 3. 25 E. 3. ca. 2. 27 & 28 E. 3. ſtatute of the ſtaple. 2 R. 2. cap. 1. and others: and alſo that the aſſeſſment of treble cuſtome was againſt law, and meerly void. And after at the parliament holden in *anno* 5 Eliz. the patent, as to aliens, was by a private act confirmed by parliament, and not for Engliſh.

Mich. 2 & 3 El. Dier manuſcr. pt not printed.

Stat. de 5 Eliz.

Trin. 41 Eliz. coram rege, rot. 92. int. Davenant and Hurdys in treſpaſſe. Trin. 44 Eliz. in Lib. 11. fo. 84, 85, &c. Edward Darcies caſe. Hil. 7 Jacobi in Lib. 8. fo. 121, 122. &c. the caſe of the City of London.

The judgement in the ſaid caſe of monopolies cited before, Trin. 44 Eliz. was the principall motive of the publiſhing of the kings book mentioned in the preamble of this act, and that book was a great motive of obtaining the royall aſſent to this act of parliament, whereof we are now to ſpeak. This act moved from the houſe of commons: the act is long and in print, and need not here to be rehearſed: yet will we peruſe and explain the words in the ſeverall branches of the act

By his grant, commiſſion, or otherwiſe.] Theſe words [or otherwiſe] are of a large extent, and are well warranted by this act, the words whereof extend not only to all proclamations, inhibitions, reſtraints, and warrants of aſſiſtance of the king, but all inhibitions, reſtraints and warrants of aſſiſtance of all or any of the privy councell or any other: and all other matters or things whatſoever either of the king, or of all or any of his privy councell to the inſtituting, erecting, ſtrengthening, furthering, or countenancing of the ſale buying, ſelling, &c. or any of them, are declared to be altogether contrary to the laws of this realm, &c. *ut in ſtatuto.* This act herein, and in the reſidue thereof, is forcibly and vehemently penned for the ſuppreſſion of all monopolies: for monopolies in times paſt were ever without law, but never without friends.

Sole.] This word [ſole] is to be applied to five ſeverall things, viz. buying, ſelling, making, working, and uſing; four of which are ſpeciall, and the laſt, viz. (ſole uſing) is ſo generall, as no monopoly can be raiſed, but ſhall be within the reach of this ſtatute, and yet for more ſurety theſe words [or of any other monopolies]

are

are added: and by reaſon of theſe words [ſole uſing] divers proviſions are made by this act, as hereafter ſhall appear.

Of any thing.] As the words before were generall, ſo theſe words [of any thing] are of a large extent. *Res enim generalem habet ſignificationem, quia tam corporea, quam incorporea, cujuſcunque ſint generis, naturæ, ſive ſpeciei, comprehendit:* and this word cauſeth ſome exceptions hereafter to be made, whereof we ſhall ſpeak in their proper place.

Whereby any perſon or perſons, &c.] For this ſee the ſtatute of Magna Carta, *ubi ſupra:* and this clauſe is impliedly warranted by theſe words [or of any other monopolies] in the firſt clauſe of the purvien.

Shall be for ever hereafter examined, heard, tried, and determined by and according to the common laws of this realm, and not otherwiſe.] This act having declared all monopolies, &c. to be void by the common law, hath provided by this clauſe, that they ſhall be examined, heard, tried, and determined in the courts of the common law according to the common law, and not at the councell table, ſtar-chamber, chancery, exchequer chamber, or any other court of like nature, but only according to the common laws of this realm, with words negative, and not otherwiſe: for ſuch boldn ſſe the monopoliſts took, that often at the councell table, ſtar chamber, chancery, and exchequer chamber, petitions, informations, and bils were preferred in the ſtar-chamber, &c. pretending a contempt for not obeying the commandements and clauſes of the ſaid grants of monopolies, and of the proclamations, &c. concerning the ſame: for the preventing of which miſchief this branch was added. [183]

That all perſon and perſons, bodies politique, and corporate whatſoever, which now are, or hereafter ſhall be, ſhall ſtand, and be diſabled, and uncapable, &c.] This branch for further extirpation of all monopolies, diſableth all men, &c. to have, that is, to take any monopoly, or to uſe, exerciſe, or put in ure any monopoly, &c. whereby the wiſh and deſire of the poet is granted.

> *Funditus extirpa monopolas et nomopolas;*
> *Hic labor, hoc opus eſt; Hercule major eris.*
> *Paucorum nocuit ſcelerata licentia multis,*
> *Argento mutat dum monopola piper.*

If any perſon or perſons after the end of forty dayes next after the end of this preſent ſeſſion of parliament ſhal be hindred, grieved, diſturbed, or diſquieted, &c.]

By this branch ſix things are provided and enacted. 1. Remedy is given to the party grieved at the common law by action or actions to be grounded upon this ſtatute. 2. This remedy may be had in the court of the kings bench, common pleas, and exchequer, or any of them, at the election of the party grieved. 3. The party grieved ſhall recover treble damages, and double coſts. 4. No eſſoin, protection, wager of law, aid prayer, priviledge, injunction, or order of reſtraint to be allowed in any ſuch action. By (aid prayer) is intended as well the writ *de domino rege inconſulto*, as the uſuall form of aid prayer, for both are to one end, and (order of reſtraint) was added, for the councell table, ſtar-chamber, chancery, exchequer chamber, and the like.

5. If any perſon or perſons ſhall after notice given, &c. cauſe

or procure any ſuch action to be ſtayed or delayed before judgement, by colour or means of any order, warrant, power or authority, ſave onely of the court wherein ſuch action ſhall be brought and depending, the perſon or perſons ſo offending ſhall incur the danger of premunire, &c.

This clauſe extends to the privy councell, ſtar-chamber, chancery, exchequer chamber, and the like, and likewiſe to thoſe that ſhall procure any warrant, &c. from the king, &c. and ſo it was reſolved by a committee of both houſes before this bill paſſed; but it extendeth not to the judges of the court before whom any ſuch action ſhall be brought, for before judgements, days muſt be given by orders of court, &c.

6 Or after judgement had upon ſuch action ſhall cauſe or procure execution of or upon any ſuch judgement, to be ſtayed by colour or means of any order, warrant, power or authority, ſave only by writ of error and attaint, the perſon or perſons ſo offending ſhall incur the danger of premunire, &c.

This clauſe is more generall then the former, being the fifth clauſe, for this extendeth alſo to the judges of the court where the action is brought or depending, if any ſtay or delay be uſed by them after judgement, and ſo it was reſolved as is aforeſaid.

[184] There be in this act concerning monopolies or ſole buying, &c. many proviſoes. The firſt is, that this act ſhall not extend to any letters patents or grants of priviledge heretofore made of the ſole working or making of any manner of new manufacture: but that new manufacture muſt have ſeven properties. Firſt, it muſt be for twenty one years or under. Secondly, it muſt be granted to the firſt and true inventer. Thirdly, it muſt be of ſuch manufactures, which any other at the making of ſuch letters patents did not uſe: for albeit it were newly invented, yet if any other did uſe it at the making of the letters patents, or grant of the priviledge; it is declared and enacted to be void by this act. Fourthly, the priviledge muſt not be contrary to law: ſuch a priviledge, as is conſonant to law, muſt be ſubſtantially and eſſentially newly invented; but if the ſubſtance was in *eſſe* before, and a new addition thereunto, though that addition make the former more profitable, yet is it not a new manufacture in law: and ſo was it reſolved in the exchequer chamber, Paſch. 15 Eliz. in Bircots caſe for a priviledge concerning the preparing and melting, &c. of lead ore: for there it was ſaid, that that was to put but a new button to an old coat; and it is much eaſier to adde then to invent. And there it was alſo reſolved, that if the new manufacture be ſubſtantially invented according to law, yet no old manufacture in uſe before can be prohibited. Fifthly, nor miſchievous to the ſtate by raiſing of prices of commodities at home. In every ſuch new manufacture that deſerves a priviledge, there muſt be *urgens neceſſitas*, and *evidens utilitas*. Sixthly, nor to the hurt of trade. This is very materiall and evident. Seventhly, nor generally inconvenient. There was a new invention found out heretofore, that bonnets and caps might be thickned in a fulling mill, by which means more might be thickned and fulled in one day then by the labours of fourſcore men, who got their livings by it. It was ordained that bonnets and caps ſhould be thickned and fulled by the ſtrength of men, and not in a fulling mill, for it was holden in-

Concerning new manufactures and heretofore granted, &c.

Paſch. 15 Eliz. in the exchequer chamber Bircots caſe.

Rot. parl. 21 E. 4. nu. 29. 22 E. 4. ca. 5. 7 E. 6. ca. 6. 3 Jacobi, ca. 5.

inconvenient to turn ſo many labouring men to idleneſſe. If any of theſe ſeven qualities fail, the priviledge is declared and enacted to be void by this act: and yet this act, if they have all theſe properties, ſet them in no better caſe, then they were before this act.

The ſecond proviſo concerneth the priviledge of new manufactures hereafter to be granted: and this alſo muſt have ſeven properties, firſt it muſt be for the tearm of fourteen years or under: the other ſix properties muſt be ſuch as are aforeſaid, and yet this act maketh them no better, then they ſhould have been, if this act had never been made, but only except and exempt them out of the purvien, and penalty of this law. Concerning new manufactures hereafter to be granted, &c.

The cauſe wherefore the priviledges of new manufactures either before this act granted, or which after this act ſhould be granted, having theſe ſeven properties, were not declared to be good, was, for that the reaſon wherefore ſuch a priviledge is good in law is, becauſe the inventor bringeth to and for the common wealth a new manufacture by his invention, coſt and charges, and therefore it is reaſon, that he ſhould have a priviledge for his reward (and the incouragement of others in the like) for a convenient time: but it was thought that the times limited by this act were too long for the private, before the common wealth ſhould be partaker thereof, and ſuch as ſerved ſuch priviledged perſons by the ſpace of ſeven years in making or working of the new manufacture (which is the time limited by law of apprenticehood) muſt be apprentices or ſervants ſtil during the reſidue of the priviledge, by means whereof ſuch numbers of men would not apply themſelves thereunto, as ſhould be requiſite for the common wealth, after the priviledge ended. And this was the true cauſe wherefore both for the time paſſed, and for the time to come, they were left of ſuch force, as they were before the making of this act.

The third proviſo is, that this act ſhall not extend or be prejudicial to any grant or priviledge, power or authority heretofore made, granted, allowed, or confirmed by any act of parliament now in force, ſo long as the ſame ſhall ſo continue in force. This was added for that the city of London and other cities and boroughs, &c. have ſome priviledges for buying, ſelling, &c. by acts of parliament. For example, the ſtatute of 1 & 2 Ph. and Mar. giveth a priviledge to cities, boroughs, towns corporate, and market towns, for the ſale by retale of certain wares and merchandizes, and ſome other acts of parliament in like caſe: all which do prove, that ſuch priviledge could not be granted by letters patents. But ſpecially this clauſe was added in reſpect of the generality of theſe words [ſole uſing.] [185] 1 & 2 Ph. and Mar. cap. 7.

The fourth proviſo. Provided alſo, and it is hereby further intended, declared, and inacted, that this act, &c. ſhall not in any wiſe extend, or be prejudiciall unto the city of London, &c.

By this proviſo, not only the grants, charters, and letters patents to any city or towne corporate, &c. but alſo the cuſtomes uſed within the ſame, are excepted out of this act: which ſeemeth to be more than need, becauſe the firſt clauſe of the purvien of this act doth extend but to commiſſions, grants, licences, charters, and letters patents.

The fifth proviſo doth except out of the purvien and penalty of

this ſtatute four things, but leaveth them of the like force and effect, and no other, as this act had never been made. Firſt, the priviledge concerning printing made, or hereafter to be made. Secondly, commiſſions, grants, and letters patents made or hereafter to be made for or concerning the digging, making, or compounding of ſalt-petre or gunpowder. Thirdly, or the caſting or making of ordnance, or ſhot for ordnance. Fourthly, grants and letters patents heretofore made, or hereafter to be made of any office or offices heretofore erected, made, or ordained, and now in being, and put in execution, (other then ſuch offices as have been decried by any his majeſties proclamations.) So as to the thing by this branch excepted, four things are required. Firſt that it be an office. This extendeth only to lawfull offices for divers cauſes. 1. It was neceſſary to except lawfull offices in reſpect of theſe words [ſole uſing.] 2. Offices are duties, ſo called, to put the officer in minde of his duty. 3. That which is voide and againſt law, is no duty, unleſſe it be not to uſe them. 4. Such as are erected againſt law, are monopolies and oppreſſions of the people, and no offices. 5. In acts of parliament lawfull offices are intended; as in like caſes hath been often adjudged: therefore unlawfull offices are all taken away by this act, and lawfull offices remain and continue.

Lit. ſect. 731. Pl. com. 246. b. 11 H. 4. 80. 4 E. 4. 31. pl. 2.

Secondly, that it be an office heretofore erected. By this act the erection of all new offices, which were not erected before this act, are wholly taken away.

Thirdly, that it be now in being, and put in execution. Though the office were erected before this act, yet if it were not in being and put in execution the 19 day of February in the 21 year of the reigne of king James (at what time this parliament begun) it is cleerly taken away by this act.

Fourthly, that it be ſuch an office, as hath not been decried (for ſo is the record of parliament, and not [decreed] as it is in the printed book) by any of his majeſties proclamations: for all ſuch offices as be decried, that is, either forbidden, or prohibited by any of his majeſties proclamations, or where the party grieved is left to his remedy at the common law by any proclamation, they be alſo decried; for being contrary to the lawes of this realme, as it is declared and enacted by this act, they are alſo decried with a witneſſe, and can never be granted hereafter.

See the proclamation bearing date 10 July, an. 19 Jac. regis, and another proclamation bearing date, 20 Martii an. 19 Ja. regis.

The fift proviſo concerning the making of allom, or allome-wines, needed not, for they belong to the ſubject in whoſe ground ſoever the oare is: and therefore any priviledge thereof cannot be granted, but in the kings owne grownd.

The ſixth proviſo concerns the hoſtmen of Newcaſtle, &c. This clauſe was inſerted in reſpect of theſe words [ſole uſing].

The reſt of the proviſoes concerne particular perſons, and do exempt and except certaine ſuppoſed priviledges out of the purvien and penalty of this law, but leaveth them of like force and effect as they were before the making of it.

But it is to be obſerved, that all the proviſoes after the ſixth, extend only to the ſuppoſed priviledges therein particularly mentioned, already granted, and not to any to be granted hereafter.

CAP.

CAP. LXXXVI.

Againſt thoſe that obtaine Power to diſpenſe with penall Lawes, and Forfeitures thereof.

The ſtatute of 21 Jac. cap. 3.

IT appeareth by the preamble of this act, that all grants of the benefit of any penall law, or of power to diſpence with the law, or to compound for the forfeiture, are contrary to the ancient fundamental lawes of this realm.

In Exilio Hugonis.

It was one of the articles wherefore the Spencers in the reigne of king E. 2. were ſentenced, that they procured the king to make many diſpenſations *Per lour malveis counſell deceaſant ceo q. le roy ad grant p. parliament p. bone advice.*

Rot. parliam. 50 E 3. nu. 17. & 28.

In 50 E. 3 Richard Lions a merchant of London, and the Lo. Latimer, were ſeverally ſentenced in parliament for procuring of licenſes and diſpenſations to tranſport wools, &c.

See 28 H. 6. nu. 30. before.

The purvien of the act of 21 Jac. cap. 3.

The offence deſcribed.

It is declared and enacted, that all commiſſions, grants, licenſes, charters, and letters patents, heretofore made or granted, to any perſon or perſons, bodies politick, or corporate, of any power, liberty, or faculty, to diſpenſe with any others, or to give licenſe or toleration to doe, uſe, or exerciſe any thing againſt the tenure or purport of any law or ſtatute, or to give, or make any warrant for any ſuch diſpenſation, licenſe or toleration to be had, or made, or to agree, or compound with any others for any penaltie or forfeitures limited by any ſtatute, or of any grant or promiſe of the benefit, profit, or commoditie of any forfeiture, penalty or ſumme of money, that is or ſhall be due by any ſtatute before judgement thereupon had, and all proclamations, inhibitions, reſtraints, warrants of aſſiſtance, and all other matters and things whatſoever, any way tending to the inſtituting, erecting, ſtrengthening, furthering, or countenancing of the ſame or any of them, are altogether contrary to the lawes of this realme, in no wiſe to be put in execution.

And ſhall be for ever hereafter examined, heard, tried, and determined, by and according to the common lawes of this realme; and not otherwiſe, &c.

Provided alſo, that this act ſhall not extend to any warrant or privie ſeale made or directed, or to be made or directed by his majeſtie, his heirs or ſucceſſors to the juſtices of the courts of kings bench, common pleas, barons of the exchequer, &c. and other juſtices for the time being, having power to heare and determine, &c. to compound, &c.

This

This act moved from the houſe of commons. Now let us peruſe, firſt, the words of the purvien of this act, and ſecondly, of this proviſo.

In and by the purvien five things are declared and enacted to be void, and contrary to the ancient fundamentall lawes of this realme. Firſt, all commiſſions, licenſes, charters, and letters patents of any power, liberty, or faculty, or to give licenſe or toleration to do, uſe, or exerciſe any thing againſt any law or ſtatute. The reaſon hereof is notably expreſſed by the reſolution of all the judges of England, in the caſe of penall ſtatutes, whereunto we refer you,

Hil. 2 Jac. lib. 7. fo. 36. b. the caſe of penal ſtatutes.

[187]

2. *Or to give or make any warrant for any ſuch diſpenſation, licenſe, or toleration.*] For this branch alſo, ſee the ſaid caſe of penall ſtatutes, *ut ſupra.*

3. *Or to agree or compound with any others for any penalty or forfeitures limited by any ſtatute.*] By this branch, all commiſſions to agree or compound with any others for any penalty or forfeiture limited by any ſtatute, are declared to be void, and againſt the ancient fundamentall lawes of the realme. The great inconvenience hereof appeared in the proceedings of Empſon and Dudley, in the reigne of king H. 7. who had the office of maſters of the forfeitures: and by colour of their commiſſion and office, did moſt intolerably and unlawfully oppreſſe, burden, and depauperate the ſubjects. Let them which follow their ſteps be afraid of their fearfull end: *Qui eorum veſtigia ſequuntur, eorum exitus perhorreſcant.* The like oppreſſion was uſed by certain commiſſioners for compoſitions to be made for offences committed againſt penall ſtatutes, in the reigne of queen Mary. This branch hath ſtrucken at the root, and prevented this miſchief for ever hereafter.

4. *Or of any grant or promiſe of the benefit, profit, or commodity of any forfeiture, penalty, or ſum of money, that is or ſhall be due by any ſtatute before judgement thereupon had.*] This branch declareth not only the grant to be void, and againſt the lawes of this realme, (for the which, ſee the reſolution of all the judges in the ſaid caſe of penall ſtatutes, *ubi ſupra,*) but the promiſe thereof alſo. And the reaſon that the judges yeeld there, is notable in theſe words. For that in our experience it maketh the more violent and undue proceeding againſt the ſubject to the ſcandall of juſtice, and offence of many. So as the grant or promiſe of any forfeiture before judgement, is both againſt law, and inconvenient. And if it be ſo in caſe of a forfeiture or penalty; much more in caſe of life and death, for the forfeiture, &c, of any man to be begged, before he be duly and lawfully attainted. For, as the judges ſay, there is the more violent and undue proceeding againſt the ſubject to the ſcandall of juſtice, and the offence of many; and therefore ſuch beggers are offenders worthy of ſevere puniſhment.

Micah 7. 2.

Againſt theſe hunters for blood the prophet ſpeaketh thus, *Periit ſanctus de terra, et rectus in hominibus non eſt, omnes in ſanguine inſidiantur, vir fratrem ſuum ad mortem venatur.* There is not a godly man upon earth, there is not one righteous amongſt men, they all lye in wait for blood, and every man hunteth his brother to death.

5. *And all proclamations, inhibitions, reſtraints, warrants of aſſiſtance, and all other matters or things any way tending to the inſtitut-*

ing,

ing, erecting, ſtrengthening, &c.] This is the like clauſe, and is ſo to be expounded, as before hath been in the chapter of Monopolies.

Concerning the ſaid proviſo, the judges before whom the cauſe dependeth, and that have power to hear and determine the ſame, who are preſumed to be indifferent between the king and the ſubject, may by warrant or privie ſeale, &c. compound, &c. for the king only, after plea pleaded by the defendant.

There is another proviſo concerning letters patents, or commiſſions for licenſing of keeping of any tavern, or ſelling, &c. of wines, &c. or for the making of any compoſitions for ſuch licenſes, ſo as the benefit of ſuch compoſitions be reſerved, and applyed to or for the uſe of his majeſtie, his heirs or ſucceſſors and not for the private uſe of any other perſon or perſons.

The report of the ſaid caſe of penall ſtatutes was a principall motive of the kings book, mentioned in the preamble of this act: and that book amongſt other juſt and weighty cauſes moved the king to give his royall aſſent to this act of parliament, &c. whereof we have ſpoken.

CAP. LXXXVII. [188]

Againſt Concealours *(turbidum Hominum Genus)* and all Pretences of Concealements whatſoever.

THAT the kings majeſtie, his heirs, or ſucceſſors, ſhall not at any time hereafter ſue, impeach, queſtion, or implead any perſon or perſons, bodies politick, or corporate, &c. Statut. de anno 21 Jac. cap. 2.

The act is long, and need not here be rehearſed. Yet will we peruſe and explain the ſeveral branches and parts of the act.

Before the making of this ſtatute, in reſpect of that ancient prerogative of the crowne, that *nullum tempus occurrit regi*, the titles of the king were not reſtrained to any limitation of time: for that no ſtatute of limitation that ever was made, did ever limit the title of the king to any mannors, lands, tenements, or hereditaments, to any certaine time. And where many records and other muniments, making good the eſtate and intereſt of the ſubject, either by abuſe or negligence of officers by devouring time were not to be found; by means whereof, certain indigne and indigent perſons prying into many ancient titles of the crown, and into ſome of later time concerning the poſſeſſions of divers and ſundry biſhopricks, dean and chapters, and the late monaſteries, chauntries, &c. of perſons attainted, and the like, have paſſed ſurreptitiouſly in letters patents, oftentimes under obſcure and generall words, the mannors, lands, tenements, and hereditaments of long time enjoyed by the ſubjects of this realm, as well eccleſiaſticall as temporall: now

now to limit the crown to ſome certaine time, to the end, that all the ſubjects of this realme, their heirs and ſucceſſors, may quietly have, hold, and enjoy, all and ſingular manners, lands, tenements, and hereditaments, which they, their anceſtors, or predeceſſors, or any other, by, from, or under whom they claime, have of long time enjoyed; this act was made and moved from the houſe of commons, the body whereof conſiſteth of three parts. Firſt, that part which above is in part rehearſed, conſiſteth on three branches.

The firſt part.

Firſt, That the king, his heirs or ſucceſſors, ſhall not at any time hereafter, ſue, impeach, queſtion, or implead any perſon or perſons, bodies politick or corporate, for, or in any wiſe concerning any mannors, &c. *Secondly*, Or for or concerning the revenues, iſſues, or profits thereof. *Thirdly*, Or make any title, claime, challenge, or demand, &c.

This part is excluſive and negative: and herein ſix things are to be obſerved.

1. This clauſe extendeth to all maner of ſuits, &c. either in law, or in equity. 2. To all manner of courts whatſoever. 3. It extendeth not only to all manner of ſuits, but to all impeachments, queſtionings, impleadings, making of title, claimes, challenges, or demands. 4. Under theſe words [right, and title] not only bare rights and titles are comprehended, but reall eſtates alſo. 5. Not only ſuits, &c. for or concerning any mannors, &c. but for or concerning the revenues, iſſues, or profits, &c. and this extendeth to the ancient demeans of the crowne, which are mentioned to be reſtrained by an act of 11 H. 4. 6. So as all writs of *ſcire fac'* or other proces upon any record; all informations of intruſion, or charging any man as bayliffe: all finding of offices, either of intitling the king, or of information, are reſtrained, not only within theſe words [impeach or queſtion] but alſo within theſe words [or make any title, claime, challenge, or demand] which are large and beneficial words, and all other ſuits, &c. of what kind or nature ſoever. But this negative clauſe muſt have four incidents. 1. The kings right and title muſt accrew unto him above threeſcore years paſt before the nineteenth day of February, in the 21 year of king James, which was the day of the beginning of this parliament. The reaſon hereof was, that if any title of eſcheat, forfeiture, &c. accrewed within threeſcore years, then it ſhould be out of this act: for generally the time of limitation to bar the king was threeſcore years, but ſuch right or title muſt now be *in eſſe*. 2. Unleſſe the king or his progenitors, &c. or any under whom he or they claim, have been anſwered by force and vertue of any ſuch right or title to the ſame, the rents, revenues, iſſues, or profits thereof within threeſcore years, &c. In this branch theſe words [by force and vertue of any ſuch right or title] were materially added, for otherwiſe if the king had been anſwered the rents, revenues, &c. by reaſon or pretext of wardſhip, primer ſeiſon, extent, or the like, it might have made a doubt whether ſuch an anſwering of the revenues, &c. had been within this act; which doubt is cleared, that it muſt be by force or vertue of any ſuch right or title, whereby the king impeacheth the ſtate of the ſubject. 3. Or

Rot. Par. 11 H. 4. nu. 23. not imprinted.

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that the ſame have been duly in charge to his majeſty, or to the late queen Elizabeth within the ſpace of threeſcore years. Duly in charge in judgement of law, is the roll of the pipe: for although a note before the auditor or any other may be a mean to bring it in queſtion, and ſo be put in charge, yet that is not in judgement of law ſaid to be duly in charge, unleſſe it be in charge in the pipe.

4. Or have ſtood in ſuper of record within the ſaid ſpace of threeſcore years. It cannot ſtand in ſuper, unleſſe the thing in queſtion were before duly in charge.

But there is a good proviſo added towards the end of this act, viz. that no putting in charge, or ſuper, or anſwering of the farm rents, revenues, or profits, &c. in four caſes ſhall be within this act, viz. by force, colour or pretext of any letters patents of concealments: they were called letters patents of concealments, becauſe either they had a clauſe before the *habendum*: *quæ quidem maneria nuper fuerunt à nobis concelata, ſubtracta, vel injuſte detenta*, or to the like effect; or elſe a proviſo after the *habendum* to the like effect. Letters patents of concealment were granted in queen Maries time; and the firſt that I find, were granted to Sir George Howard; and in all ſucceeding acts of parliament of confirmation of letters patents, letters patents of concealments are excepted.

2. Or defective title. By letters patents paſſed by the warrant of certain commiſſioners under the great ſeal for compoſitions of defective titles, pretending the ſame to be for the kings benefit, and ſafety of the ſubject, in which letters patents no words of concealment, &c. are mentioned, but yet upon the matter, they were ſuppoſed to be concealed, &c. from the crown.

3. Or of lands tenements or hereditaments out of charge. This was a new device to have a certificate, that they were not in charge, and then to take a grant from the king, for a very ſmall compoſition, &c. And theſe were but inventions and ſubtill devices to deceive the king, to rob him of his tenures, and to the infinite vexation and trouble of the ſubject, all which miſchiefs are now remedied by this act.

4. Or by force, colour or pretext of any commiſſion or other authority to find out concealments, defective titles, or land, &c. out of charge. This was a neceſſary clauſe to be added, for of this kind there were infinite numbers.

Out of this firſt part all liberties and franchiſes be excepted.

The ſecond part.

And that every perſon and perſons, bodies politique and corporate, their heirs and ſucceſſors, and all claiming from, by, or under them, or any of them, for and according to their ſeverall eſtates and intereſts, which they have, or claim to have in the ſame reſpectively, ſhall hereafter quietly and freely have, hold and enjoy againſt his majeſty, his heirs and ſucceſſors, &c.

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This is the ſecond part of the body of the act, and as the firſt part is negative and excluſive of the right and title of the king, ſo this part is affirmative, and eſtabliſhing the eſtate of the ſubject.

The

The miſchief before this ſtatute was in two ſorts, viz. either when the king had any eſtate veſted, or continued in him; or where the king had but a bare right. For example, the kings tenant ſeiſed of lands, &c. in fee is attainted of felony, and dieth, the king hath a real eſtate in him: but if before the felony the kings tenant were diſſeiſed, and after is attainted, and dieth, now hath the king but a bare right. In both theſe caſes, *et ſic in ſimilibus*, the ſubject is provided for by this act, both by the firſt part, and by this alſo: for where in this part it is ſaid, according to their and every of their ſeveral eſtates and intereſts which they have or claim. If they have an eſtate, and the king but a bare right or title, then are they within theſe words [which they have] and if the king hath a reall eſtate in him, then are they within theſe words [or claim] ſo as the remedy is applied to both the miſchiefs. Again, the words in this part are further, have held, or enjoyed. That is, where the ſubject hath an eſtate, and the king but a bare right or title.

Or taken the rents, iſſues, revenues, or profits thereof.] Theſe words extend to all caſes where the reall eſtate is in the king: hereby is underſtood the actuall taking of the rents, iſſues, revenues, or profits by one that claims an intereſt in the land: for albeit the king may in law charge him as bailif, yet without queſtion, *de facto*, he did take the rents, iſſues, revenues and profits, and that ſufficeth to anſwer the letter and meaning of this act.

Moreover, the words of this part are, [Againſt him, his heirs or ſucceſſors.] So admit in the caſe put before, the kings tenant being diſſeiſed, as is aforeſaid, before his attainder of felony, that that diſſeiſor had been diſſeiſed, or had morgaged the land before this ſtatute, this act in this caſe barreth the king of his right and title, and to that end worketh upon the eſtate of the diſſeiſor or morgagee: but yet the firſt diſſeiſor or the morgagee, for the condition performed or broken may re-enter; for the words of this part be [againſt the king, his heirs, and ſucceſſors] ſo as the bar is only againſt them: and every ſubject ſhall take benefit of this act, for the kings right and title is thereby utterly barred: and there is a ſaving hereafter in this act to all perſons, &c. other then the king, &c. all ſuch right, &c. as they ought to have had before this act.

This part extendeth not to liberties and franchiſes.

Now followeth the third part of the purvieu of this act.

The third part. And furthermore, that every perſon and perſons, bodies politique and corporate, their heirs and ſucceſſors, &c. ſhall quietly and freely have, hold, and enjoy all ſuch mannors, &c. as they now have, claim, and enjoy, &c. againſt all and every perſon and perſons, their heirs and aſſigns having, claiming, or pretending to have any eſtate, right, title, intereſt, claim or demand whatſoever, &c. by reaſon, or colour of any letters patents, or grants upon ſuggeſtion of concealment, or wrongfull detaining, or not being in charge, or defective titles, or by, from, or under any patentees, &c. of or for which mannors, &c. no verdict, &c.

This

This part ſecures the ſubject againſt the ſubject, viz. againſt patentees and grantees of concealments, defective titles, or lands not in charge, and all claiming under them. A beneficiall law both for the church and common wealth, in reſpect of the multitude of letters patents and grants of theſe natures and qualities, and many of them of large extents and in generall words, and had paſſed through the hands of many indigent and needy perſons, &c.

This part extendeth to liberties and franchiſes, which the former two parts did not.

The two firſt proviſoes are plain, and in effect are included in the body of the act. The ſecond proviſo was neceſſary to preſerve tenures: the ſaving needeth no explanation. The third proviſo is particular and evident. The fourth proviſo, Provided alſo, and be it enacted, that where any fee farm rent, &c. This was added for the preſerving of the kings fee farms and rents out of ſuch mannors, &c. which are eſtabliſhed and made ſure by this act. For example: king E. 6. did grant the mannor of D. which came to him by the ſtatute of Chanteries, to I. S. and his heirs, reſerving a fee farm, or any other rent, which grant for ſome imperfection was inſufficient in law to paſſe the ſaid mannor, and yet is eſtabliſhed and made ſure by this act. This proviſo maketh good the fee farm or rent to the king, if he hath been anſwered the ſame by the greater part of ſixty years laſt paſt. [191]

The laſt proviſo is particular and evident.

Of the benefit of this act the poor doe participate, as well as the rich, for hereby (amongſt other things) above an hundred lay hoſpitals having had prieſts within them in thoſe days to pray and ſing for ſouls, &c. (if need were) are eſtabliſhed againſt all vexations, and pretences of concealments.

See an excellent act made againſt theſe harpyes or heluones, that under obſcure words endeavoured ſurreptitiouſly in a patent of concealment to have ſwallowed up the greateſt part of the poſſeſſions of that ancient and famous biſhoprick of Norwich, which by the induſtry and proſecution of the then attorney generall was overthrown, and yet for more ſurety in a matter of ſo great weight preferred a bill in parliament for eſtabliſhing of the biſhoprick, which in the end paſſed as a law, *anno* 39 El. *ubi ſupra*.

See 39 El. ca. 22. which is worthy to be read. See this caſe at large in the fourth part of the Inſtitutes cap. Conſiſtory Courts, &c.

Triſtius haud illis monſtrum, nec ſævior ulla
Peſtis et ira Dei ſtygiis ſeſe extulit undis:
Virginei volucrum vultus, fœdiſſima ventris
Proluvies, uncæque manus, et pallida ſemper
Ora fame.

CAP.

CAP. LXXXVIII.

Againſt Vexatious Relators, Informers, and Promooters upon Penall Statutes.

Statutum de 21 Jac. reg. c. 4.

THAT all offences hereafter to be committed againſt any penall ſtatute, for which any common informer or promooter may lawfully ground any popular action, bill, plaint, ſuit or information, &c. ſhall be commenced, ſued, proſecuted, &c. before the juſtices of aſſiſe, juſtices of niſi prius, &c. in the counties where the offences were committed, and not elſewhere.

18 El. ca. 5.

Whereas a good and profitable law was made in the 18 year of queen El. for the eaſe and quiet of the ſubject, and for the regulating of informers upon penall ſtatutes, inflicting corporall puniſhments in certain caſes upon them. And whereas two other good laws were made for the ſame ends, the one in the 28 year, and the other in the 31 year of the ſaid late queens reign, which yet ſtand and remain in force: yet theſe acts did not meet with all the miſchiefs and grievances offered to the ſubject by the relators, informers and promooters, *(turbidum hominum genus)* but theſe four miſchiefs and grievances remained ſtill.

28 El. ca. 5.
31 El. ca. 10.

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Firſt, many penall laws obſolete, and in time grown apparently impoſſible, or inconvenient to be performed, remained as ſnares, whereupon the relator, informer or promooter did vex and entangle the ſubject: ſuch as were the ſtatutes made *anno* 37 E. 3. cap. 3. concerning the prices of poultry, and 34 E. 3. ca. 20. concerning tranſportation of corn, and 3 E. 4. cap. 2. concerning corn not to be brought into the realm, and 4 H. 7. ca. 9. concerning the prices of hats and caps, and 14 R. 2. cap. 7. concerning the paſſing of tyn out of the realm, and 15 R. 2. cap. 8. concerning the carriage of tyn to Calys, and 4 H. 5. cap. 3. concerning making of pattens of aſp, and 4 H. 7. ca. 8. concerning the prices of broadcloath, &c. and 11 H. 7. cap. 2. concerning vagabonds, unlawful games, and alehouſes, &c. and one other ſtatute in the 19 year of H. 7. ca. 12. concerning thoſe matters, and 11 H. 6. ca. 12. concerning waxchandlers, and the price of candles, and 34 H. 8. cap. 7. concerning the ſale of wines, and 28 H. 8. cap. 14. concerning the prices of wines, and 27 H. 8. ſtat. *de monaſteriis*, concerning keeping of houſe and houſholds upon ſcites of monaſteries, &c. and 4 H. 7. cap. 19. concerning houſes of huſbandry and tillage, and 7 H. 8. ca. 1. concerning letting down of towns, and 27 H. 8. cap. 22. concerning decay of houſes and incloſures, and 5 E. 6. ca. 5. for the maintenance of tillage, &c. and 5 Eliz. cap. 2. for maintenance and increaſe of tillage, and 14 R. 2. ca. 4. 8 H. 6. ca. 23. and 5 E. 6. cap. 7. concerning the buying of wooll, woollen yarn, &c. and 33 H. 8. cap. 5. concerning the keeping

keeping of great horſes, the ſtatute of Wincheſt. in the time of E. 1. concerning harneſſe and arms, Artic. ſuper Cart. ca. 20. concerning making of rings, croſſes, and locks, and 37 E. 3. cap. 7. that makers of white veſſell ſhould not guild, and 2 H. 5. ca. 4. ſtat. 2. that goldſmiths ſhould not take more then forty ſix ſhillings eight pence for a pound of troy ſilver guilt, and 2 H. 6. ca. 14. that no ſilver ſhall be bought for more then thirty ſhillings the pound of troy, and 2 H. 4. ca. 6. againſt the bringing in of coin of Flanders, Scotland, and other forain coin, and 13 R. 2. ca. 8. and 4 H. 4. cap. 25. concerning the prices of hay and oats ſold by hoſtlers, and 4 & 5 Ph. and Mar. ca. 5. concerning the putting to ſale of coloured cloth: and another part of the ſame ſtatute concerning the myſtery of making, weaving, or rowing of woollen cloth, &c. and 18 El. ca. 16. for toleration of certain clothiers to dwell out of towns corporate, and many other unneceſſary ſtatutes unfit for this time, about the number of threeſcore are repealed by an act made at this parliament in the 21 year of the reign of king James, as by that act appeareth: and many like acts are not continued, as by the conference between that act and other former acts of continuance may appear: ſo as theſe ſnares that might have lien heavy upon the ſubject, by this and other former ſtatutes either are repealed, or not continued. 13 E. 1. ſtat. de Winton.

The ſecond miſchief was, that common informers, and many times the kings attorny drew all informations for any offence, in any place within the realm of England againſt any penall law to ſome of the kings courts at Weſtminſter, to the intolerable charge, vexation, and trouble of the ſubject; and it was feared that Weſtminſter hall would labour of an apoplexy by drawing up all ſuits unto it, as the naturall body doth *tabeſcere*, when the humours of the body are drawn up unto the head, which in the end (if it be not prevented) turneth to an apoplexy.

The third miſchief was, that in informations, &c. the offence ſuppoſed to be againſt the penall law, and to be committed in one county, was at the pleaſure of the informer, &c. alledged in any county where he would, where neither party nor witneſſe was known, againſt the right inſtitution of the law, that the jury (for their better notice) ſhould come *de vicineto* of the place where the fact was committed.

The fourth miſchief was, that in divers caſes the party defendant in informations or actions upon the ſtatute, were driven to plead ſpecially, which was both chargeable and dangerous to him, if his plea were not both ſubſtantiall and formall alſo.

Theſe three miſchiefs laſt mentioned are expreſly and abſolutely provided for by this act, which moved from the houſe of commons. And ſo did the act of continuing and reviving of divers ſtatutes, and repeale of divers others. [193] 21 Jac. cap. 28.

The firſt part of the purvien beginning thus. For remedy whereof be it enacted by the authority of this preſent parliament, that all offences, &c. The firſt part of the act.

This clauſe conſiſteth upon three parts. Firſt, affirmative: and this is divided into two branches. 1. For the informations, &c. It is enacted, that where a common informer might before this act have informed upon any penall ſtatute before juſtices of aſſiſe, juſtices of *niſi prius*, or juſtices of gaole-delivery, juſtices of oier and terminer,

miners, or juſtices of peace in their generall or quarter ſeſſions; there a common informer may informe, &c. 2. Before what judges; this act appoints no new judges, but ſuch as former penall lawes appointed, viz. the juſtices before mentioned, or any of them according to the former act.

The ſecond part is reſtrictive, reſtraining any information, &c. to be commenced, ſued, &c. either by the attorny generall, or by any officer, common informer, or any other perſon whatſoever, in any of the kings courts at Weſtminſter. So as the kings bench, ſtar-chamber, chancery, common-pleas, exchequer, or exchequer-chamber, cannot receive or hold plea of any information, &c. upon any penall ſtatute, either by the kings attorny, any common informer, or any other perſon whatſoever: but the matter ſhall be heard and determined before ſuch juſtices as are foreſaid in the proper county where the offence was committed.

The third part giveth the like proces upon every popular action, bill, plaint, information, or ſuit to be commenced or proſecuted by force, of, or according to the purport of this act, as in an action of treſpaſſe, *vi et armis*, at the common law: but upon no other popular action, bill, &c. which is not ſued, &c. by force of this act.

The ſecond part of the act.

The ſecond part of this act doth meet with the ſecond of the ſaid three miſchiefs, and ſtandeth upon three branches.

Firſt, that in all informations, exhibited, &c. either for the king or any other, &c. the offence ſhall be layed and alledged, &c. in the ſaid county where ſuch offence was in truth committed, and not elſewhere.

The ſecond branch is, that if the defendant pleadeth the generall iſſue, the plaintiffe or informer upon evidence to the jury muſt prove two things: firſt, the offence laid in the information, &c. Secondly, that the offence was committed in that county, otherwiſe the defendant ſhall be found not guilty.

The third branch is, that for more ſurety that the offence ſhall be alledged truly in the proper county where in truth it was committed, no information, &c. ſhall be received, filed, or entred of record, untill the informer, or relator hath firſt taken a corporall oath before ſome of the judges of that court, which conſiſteth on two parts: firſt, that the offence or offences laid in ſuch information, &c. were not committed in any other county, then where the ſame are alledged in the information, &c. Secondly that he believeth in his conſcience, that the offence was committed within a year before the information or ſuit. And this oath is to be entred of record. And all this is to be done before the information be received, filed, or entred of record.

The third part of the act.

The third part of this act meeteth with the laſt miſchiefe: for by this part the defendant may plead the generall iſſue, and give any ſpeciall matter in evidence to the jury: which matter being pleaded, had been a good and ſufficient matter in law, to have diſcharged the defendant, &c.

27 H. 8. f. 21, &c.

This is a very beneficiall clauſe, and cleereth many queſtions at the common law. And where it may be objected, that for want of ſufficient clerks, the proceeding according to this ſtatute will be erroneous, and to be reverſed by writ of errour, ſo as it will deter informers to informe, &c. and in effect, lay aſleep all penall lawes

To

To this it may be anſwered, Firſt, that it ſhall be the fault of the informer himſelfe; for if he informe before juſtices of aſſiſe or *niſi prius*, they * have ſufficient clerks. Secondly, I perſuade my ſelfe, that the othe' juſtices will in diſcharge of their conſcience and duty, provide ſufficient clerks. And laſtly, that few or no errours ſhall fall out in reſpect of the generall pleading.

The laſt clauſe of this act is this, Provided alwayes that this act or any thing therein contained, ſhall not extend to any information, &c.

By this clauſe this act extends not to penall ſtatutes of theſe ſorts: concerning 1. Popiſh recuſants for not comming to church. 2. Maintenance, champerty, or buying of titles. 3. The ſubſidie of tonnage and poundage, wooll, &c. 4. The defrauding the king of any cuſtome, tonnage, poundage, ſubſidie, impoſt, or priſage. 5. Tranſportation of gold, ſilver, powder, ſhot, munition of all ſorts, wooll, woolfels, or leather, but that every of theſe offences may be layed or alledged to be in any county at the pleaſure of any informer. But yet the informer cannot informe, &c. for any of theſe offences in any of the courts at Weſtminſter, but before the juſtices appointed by this act: for this clauſe extendeth only for the laying or alledging of any of theſe offences in any county that he will.

Inter Wideſton and Clark maior of Nottingham, the caſe was this. Wideſton being arreſted in Nottingham by precept in the nature of a capias, he was impriſoned in the cuſtody of the maior being keeper of the gaol within the ſame towne, and before the returne of the precept Wideſton offered to the maior ſufficient ſurety to appeare, &c. and he refuſed to accept the ſame: whereupon Wideſton brought his action by bill upon the ſtatute of 23 H. 6. cap. 10. whereunto the defendant pleaded the generall iſſue; and it is found by verdict againſt the defendant. In arreſt of judgement it was ſhewed, that by the ſaid ſtatute of 18 Eliz. cap. 5. it is provided, that none ſhall be admitted or received to purſue againſt any perſon upon any penall ſtatute, but by way of information or originall action, and not otherwiſe: in reſpect of the ſaid negative words it was adjudged, that, for that the ſaid action was brought by bill, and not by information or originall, *quod querens nihil capiat per billam.* See the reſt of the ſtatute of 18 Eliz. concerning informers.

Mic. 29. & 30 El. coram rege.

18 Eliz. cap. 5.

Vi. lib. 6. fo. 19. b. Gregories caſe.

You have heard of four viperous vermin, which endeavoured to have eaten out the ſides of the church and common-wealth: three whereof, viz. the monopoliſt, the diſpencer with public and profitable penall lawes for a private, and the concealers are blowne up, and exterminated: and the fourth, viz. the vexatious informer well regulated and reſtrained, who under the reverend mantle of law and juſtice inſtituted for protection of the innocent, and the good of the common-wealth, did vex and depauperize the ſubject, and commonly the poorer ſort, for malice or private ends, and never for love of juſtice. And theſe are worthily placed amongſt the pleas of the crowne, becauſe it is for the honour and benefit of the crowne, when the church and common-wealth doe flouriſh in peace and plenty; for the king can never be poore, when his ſubjects are rich.

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Hil. 36 Eliz. Rot. 135. int. plac. regis, coram rege. Hamonds caſe.

George Hamond informed upon a penall ſtatute concerning ſhipping of cloth in the name of another. *Qui tam, &c.* againſt Edw. Griffith defendant. Hamond the informer died and upon motion made by the attorney generall, it was the opinion of the whole court, that he the attorney generall might proceed for the queens moity after the death of the informer.

Trin. 31 Eliz. coram rege. Strettons caſe.

Between Stretton, *Qui tam, &c.* and Tayler defendant, that after a popular action commenced, although the attorney generall will enter an *ulterius non vult proſequi;* or if the defendant plead a ſpeciall plea, although the uſe be, that the attorney (to the end that there may be no jugling or covin between the informer and the defendant) reply only; notwithſtanding, if the attorney generall will not reply, the informer may proceed, and proſecute for his part; for the informer by his ſuit commenced hath made of a popular action his private, which the king cannot for the part of the informer pardon or releaſe. And notwithſtanding in all theſe caſes before any action or information commenced by the informer, but the ſuit remaining popular wherein the king only, and no ſubject hath any intereſt, the king may pardon and releaſe the ſame: for after that pardon, no informer can informe *tam pro domino rege, quam pro ſeipſo*, according to the ſtatute, &c. and for himſelfe only in a popular action he cannot informe.

See hereafter, cap. 105. of Pardons 37 H. 6. fo. 4. 5 E. 4. 3. 2 R. 3. fo. 12. 1 H. 7. 3.

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CAP. LXXXIX.

Of Foreſtalling, Ingroſſing, &c.

See the firſt part of the Inſtitutes, ſect. 240. Domeſday. [a] Chent. Dover. ter. [b] Wirceſter. Scirropſcir Civitas, [c] Fleta, lib. 1. ca. 42. § Foreſtall, & lib. 4. cap. 11. Britton, fo. 33. a. 77. a. [d] Vi. Vet. M. C. part. 2. 24. b. 34 E. 1. de Piſtor. Braciatoribus et aliis Victuellariis, et de Foreſtellariis, hic infra. * 51 H. 3. Raſt. weights and meaſures. 4. 25 E. 3. c. 3. ſtat. 3. 27 E. 3. cap. 11. ſtat. Stap. 28 E. 3. cap. 13. 5 E. 6. cap. 14. 5 Eliz. cap. 12. 13 Eliz. cap. 25.

FORISTEL [a], *fariſtel* [b], *foriſtellum, et foriſtellarius*, derived of two Saxon words, viz. *far* or *fare (via* or *iter) unde fare* for a paſſage and farewell, to go or proceed well: we have turned *far*, to *for* and *ſtall*, which we retaine ſtill, and ſignifieth *interceptionem*, or [c] *impedimentum tranſitus*, hindrance or interception. And the offender is called *forſtellarius*. See of this offender in the ancient ſtatute: [d] *Nullus forſtellarius in villa patiatur morari, qui pauperum ſit depreſſor manifeſte, et totius communitatis, et patriæ publicus inimicus, qui bladum, piſces, allec, vel res quaſcunque venales per terram, vel per aquam venientes, quandoque per terram, quandoque per aquam obviando præ cæteris feſtinat, lucrum ſitiens vitioſum, pauperes opprimens, ditiores decipiens, qui ſic minus juſte illo qui eos apportaverit multo magis vendere machinatur. Qui mercatores exterraneos venalibus venientibus circumvenit, offerens ſe venditioni rerum ſuarum, et ſuggerit, quod bona ſua carius vendere poterunt, quam vendere proponebant, et ſic arte, vel ingenio vellam ſeducit et patriam. Primo convictus graviter amercietur, ſecundo ſubeat judicium pilloriæ, tertio incarceretur, et redimatur, quarto abjuret villam. Et hoc judicium fiet de forſtallariis univerſis, et ſimiliter de his qui * conſilium aut auxilium eiſdem præſtiterint vel favorent, &c.* And his deſcription ſee in a latter act. See before in the chapter of Monopoliſts.

Ingroſſator or *engroſſator*, of the Engliſh and French word *groſſe*, that is, great or whole, *unde* merchant-groſſier, a merchant that ſelleth

leth by great or whole-ſale. We remember not that we have read of this word [ingroſſe] in any act of parliament, book-caſe, or record, but [c] rarely, before the ſaid act of 5 E. 6. And there is an ingroſſer by the common lawes, who is hereafter deſcribed. And there is an ingroſſer by act of parliament, and he is deſcribed by the ſtatute of 5 E. 6. And by that act a [f] regrator is alſo deſcribed, who is a kinde of ingroſſer. Regrator is derived of the French word *regratement*, for huckſtery. But in ancient time both the ingroſſor and regrator were comprehended under foreſtaller.

It was [g] reſolved by the juſtices and barons of the exchequer upon conference betwixt them, that ſalt is a victuall, and the buying and ſelling thereof was within the ſtatute of 5 E. 6. for it was not only of neceſſity of itſelfe for the food and health of man, but it ſeaſoneth and maketh wholeſome beefe, pork, &c. butter, cheeſe, &c. and other viands. And Peryam juſtice ſaid, [h] Hil. 26 Eliz. in communi banco, that ſo it had been lately adjudged.

[i] Mich. 6 Jac. in ſcaccario, in an information by Baron againſt Boy, upon the ſtatute of 5 E. 6. cap. 14. of ingroſſers for buying and ſelling of apples; the defendant pleaded not guilty, and was found guilty. But the barons gave judgement againſt the informer, and cauſed an entry to be made in the margent of the record, that the judgement was given upon matter apparent to them, that apples were not within the ſaid act, for that the act is to be intended of victuall neceſſary for the food of man, the words of the act being [corne, graine, butter, cheeſe, fiſh, or other dead victuall] which is as much as to ſay, (of other dead victuall of like quality: *id eſt*, of like neceſſary and common uſe.) And therefore apples being rather of pleaſure then neceſſity, are not within the ſaid ſtatute no more then plumbs, cherries, or other fruit; and no information hath ever been exhibited for ingroſſing of apples, plumbs, cherries, or other fruit: but the ſtatute of 2 E. 6. cap. 15. doth forbid conſpiracy of coſtermongers and fruterers, and maketh ſuch conſpiracie unlawfull. And the ſaid judgement of the barons was affirmed in a writ of errour in the exchequer chamber.

Venditio braſei non eſt venditio victualium, nec debet puniri ſicut venditio panis, vini, et cervisiæ, et hujuſmodi, contra formam ſtatuti. But the act of 5 E. 6. hath made corne, graine, &c. to be victuall within that act. *Vide* Vet. N. B. 2. part 23. b. ſtat. de piſtor., braceator., et aliis victelariis. 34 E. 1.

It was upon conference and mature deliberation reſolved by all the juſtices, that any merchant, ſubject, or ſtranger, bringing victuals or merchandize into this realme, may ſell them in groſſe: but that vendee cannot ſell them againe in groſſe, for then he is an * ingroſſer according to the nature of the word, for that he buy in groſſe, and ſell ingroſſe, and may be indicted thereof at the common law, as for an offence that is *malum in ſe*. 2. That no merchant or any other may buy within the realme any victuall or other merchandize in groſſe, and ſell the ſame in groſſe againe, for then he is an ingroſſer, and puniſhable, *ut ſupra*: for by this means the prices of victuals and other merchandize ſhall be inhaunced, to the grievance of the ſubject; for the more hands they paſſe through, the dearer they grow, for every one thirſteth after gaine, *vitioſum ſitiunt lucrum*. And if theſe things were lawfull, a riche man might ingroſſe into his hands all a commodity, and ſell the ſame at what price

[c] For the word [*Ingreſſor*,] ſee 27 E. 3. c. 5. ſtat. 1. 37 E. 3. cap. 5.

[f] For this word [*Regrator*,] ſee 51 H. 3. weights and meaſures. 4. Raſtall. 14 R. 2. ca. 4. 8 H. 6. cap. 5. Regrators or choppers, and in ſome countries called jobbers.

[g] M. 44 & 45 El. at Serjeants Inne in Fleet-ſtreet.

[h] Hil. 26 Eliz. judgement cited per *Peryam* juſtice.

[i] M. 6. Jac. in Scac. Int. *Baron* and *Boy*.

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P. 18 E. 2. Coram rege Rot. 76. Southt'.

Mich. 39 & 40. El. Reſolution de touts les juſtices.

* Dardanarius. An ingroſſer by the common law deſcribed.

—Lucrumq; acquirit eundo, Nivis uteziguus creſcit eunda globus.

price he will. And every practiſe or device by act, conſpiracy, words or newes, to inhaunce the price of victuals or other merchandize, was puniſhable by law; and they relied much upon the ſtatute aforeſaid, *nullus forſtallarius, &c.* which ſee before in this chapter: and that the name of an ingroſſer in the reigne of H. 3. and E. 1. was not known, but comprehended within this word [*forſtallarius*] *lucrum ſitiens vitioſum;* and ingroſſing is a branch of foreſtalling. And for that *forſtellarius* was *pauperum depreſſor, et totius communitatis et patriæ publicus inimicus,* he was puniſhable by the common law. They had alſo in conſideration the book in 43 Aſſ. where it was preſented, that a Lombard did procure to promote and inhaunce the price of merchandize, and ſhewed how: the Lombard demanded judgement of the preſentment for two cauſes. 1. That it did not ſound in foreſtalling. 2. That of his endeavour or attempt by words, no evill was put in ure, (that is) no price was inhaunced, *et non allocatur,* and thereupon he pleaded not guilty: whereby it appeareth, that the attempt by words to inhaunce the price of merchandize was puniſhable by law, and did ſound in foreſtalment: and it appeareth by the book that the puniſhment was by fine and ranſome. And in that caſe Knivet reported, that certaine people (and named their names) came to Coteſwold in Herefordſhire, and ſaid in deceipt of the people, that there were ſuch wars beyond the ſeas, as no wooll could paſſe or be carried beyond ſea, whereby the price of wools was abated: and upon preſentment hereof made, they appeared; and upon their confeſſion they were put to fine and ranſome. See the ſtatute of 25 H. 8. cap. 2. whereby the lords of the councell, juſtices, &c. or any ſeven of them, &c have power to ſet prices on victuals, and the ſame to be proclaimed under the great ſeale.

3 E. 2. Action ſur leſtat. F.N.B. 250. I.

43 Aſſ. p. 38. tit. Aſſ. 354.

Nota, the abatement by undue means of the price of our native commodities, is puniſhable by fine and ranſome See 23 E. 3. ca. 6. 13 R. 2. cap. 8. Inter leges Etheliſtani. cap. 12.

For preventing of all ingroſſing and foreſtalling, it was the ancient law before the conqueſt, *Decrevimus porro, ne quis extra oppidum quicquam 20 denariis carius æſtimatum emat, verum intra portum præſente oppidi præfecto, aliove viro fidele, aut ipſo denique præpoſito regio, in celebri plebis concurſu, et hominum oculis quiſque mercator.*

Inter leges Will. Conqueſt. fo. 125.

Interdicimus etiam ut nullæ pecudes emantur niſi infra civitates, et hoc ante tres fideles teſtes nec alia neceſſaria ſine fideijuſſore et warranto, &c. Item, nullum mercatum vel feria ſit, nec fieri permittatur, niſi in civitatibus regni noſtri, et in burgis, &c.

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Hil. 25 E. 3. coram rege. Rot. 13. Buck. Hadhams caſe.

*Commiſſio facta fuit Roberto Hadham ad vendend' blada et alia bona diverſarum abbathiarum alienigenarum. qui venit et cognovit, quod vendidit blada prioris de Tickford in garbis in duobus * taſſis exiſtent' pro 10 li. quæ venditio facta fuit contra legem et conſuetudinem regni Angliæ, vendend' in garbis, priuſquam triturat' fuerunt, quod fieri debuiſſet per menſuram poſt eorum trituracionem: ideo committitur priſonæ, et adjudicatur, quòd ab omni officio domini regis amoveatur, et quòd finem faciat cum domino rege.*

* Of the French word *Taſer,* to heape in goves or ſtacks. See 5 E. 6 ca. 14. He is an ingroſſer that buyes (other then by grant or leaſe of land or tithe) any corne growing in the fields, &c.

Obſerve well this judgement, that it is againſt the common law of England to ſell corne in ſheafes before it is threſhed and meaſured, and the reaſon thereof ſeemeth to be, for that by ſuch ſale the market in effect is foreſtalled.

CAP.

CAP. XC.

AGAINST ROBERDSMEN.

IT is an Engliſh proverbe; That many men talk of Robin Hood, that never ſhot in his bow: and becauſe the ſtatutes and records hereafter mentioned cannot well be underſtood, unleſſe it be known what this Robin Hoode was that hath raiſed a name to theſe kinde of men called Roberdſmen, his followers, we will deſcribe him.

This Robert Hood lived in the reigne of king R. 1. in the borders of England and Scotland, in woods and deſerts, by robbery, burning of houſes, felony, waſte and ſpoile, and principally by and with vagabonds, idle wanderers, night-walkers, and draw-latches: ſo as this notable thiefe gave not only a name to theſe kinde of men, but there is a bay, called Robin Hoods Bay, in the river of in Yorkſhire. And albeit he lived in Yorkſhire, yet men of his quality took their denomination of him, and were called Roberdſmen throughout all England.

He was, ſaith Maior Scotus, prædonum princeps et prædo mitiſſimus.

Againſt theſe men was the ſtatute of Wincheſter made in 13 E. 1. for preventing of robbery, murders, burning of houſes, &c. Alſo the ſtatute of 5 E. 3. which reciting the ſtatute of Wincheſter, and that there had been divers manſlaughters, felonies, and robberies done in times paſt, by people that he called roberdſmen, waſters, and drawlatches, and remedy provided by that act for the arreſting of them.

13 E. 1. ſtatut. de Wincheſt. ca. 1. 4. 5 H. 7. fo. 5. 5 E. 3. cap. 14.

At the parliament holden 50 E. 3. it was petitioned to the king that ribauds and ſturdy beggers might be baniſhed out of every towne. The anſwer of the king in parliament was touching ribaulds: the ſtatute of Wincheſter and the declaration of the ſame with other * ſtatutes of roberdſmen, and for ſuch as make themſelves gentlemen, and men of armes, and archers, if they cannot ſo prove their ſelves, let them be driven to their occupation or ſervice, or to the place from whence they came.

Rot. parl. 50 E. 3. nu. 61.

* 5 E. 3. cap. 14. 2 H. 5. cap. 9. 8 H. 6. cap. 14. Vid. 39 Eliz. ca. 4.

It is provided by the ſtatute of 7 R. 2. that the ſtatutes made in the time of king Edward, grandfather of the king, of roberdſmen, and drawlatches, be firmely holden and kept, and further proviſion againſt vagabonds wandring from place to place. See a law made in the ſixth parliament of queen Mary, *anno Dom.* 1555 in Scotland againſt Robert Hood, Little John, &c.

7 R. 2. cap. 5. Vid. 39 Eliz. ca. 4.

CAP. XCI.

OF BANKRUPTS.

VIDE in the fourth part of the Inſtitutes, cap. The Court of the Commiſſioners of Bankrupts.

CAP. XCII.

OF RECUSANTS.

1 Eliz. cap. 2.
23 Eliz. cap. 1.
28 Eliz. cap. 6.
35 Eliz. cap. 1, 2.
3 Jac. cap. 4.
7 Jac. cap. 6.
Lib. 10. 54. the chancelour of Oxfords caſe.
Lib. 11. 56, 57, &c. Dr. Foſters caſe.
Lib. 5. fo. 1. Caudries caſe.
Dier 3 Eliz. fo. 203.

FIRST, the acts of parliament that are made againſt them are 1 Eliz. cap. 2. 23 Eliz. cap. 1. 28 Eliz. cap. 6. 35 Eliz. cap. 1, & 2. 3 Jac. cap. 4. 7 Jac. ca. 6. Theſe acts of parliament are interpreted and expounded by divers judgements and reſolutions heretofore given. Lib. 10. fo. 54. &c. Le caſe de Chancelour, &c. de Oxford, an expoſition of the ſtatute of 3 Jac. ca. 4. et lib. 11. fo. 56, 57, &c. Doctor Foſters caſe, an expoſition of all the ſaid ſtatutes. See lib. 5. fo. 1. &c. Caudries caſe. See Dier, 3 Eliz. fo. 203. an expoſition of the ſaid act of 1 El. concerning hearing of maſſe.

CAP. XCIII.

Of Newes, Rumours, &c.

SEE the ſecond part of the Inſtitutes, W. 1. cap. 34. Newes. See alſo in the fourth part of the Inſtitutes, cap. Chancery, in the articles againſt cardinall Woolſey, artic. 32. *Convicia, ſi iraſcaris, tua divulgas, ſpreta exoleſcunt;* if you ſeek to revenge ſlanders, you publiſh them as your own: if you deſpiſe them, they vaniſh.

Tacitus.

The law before the conqueſt was, that the author and ſpreader of falſe rumours amongſt the people had his tongue cut out, if he redeemed it not by the eſtimation of his head.

Int. leg. Alvredi, cap. 28.

CAP.

CAP. XCIV.

Of Weights and Meaſures.

SEE the ſecond part of the Inſtitutes, W. 1. cap. 4. and the expoſition upon the ſame.

CAP. XCV. [199]

OF APPARELL.

DIVERSE acts of parliament have been made againſt the exceſs of apparell in the reign of E. 3. as 11 E. 3. cap. 2. & 4. 37 E. 3. ca. 8, 9, 10, 11, 12, 13, 14. 38 E. 3. 3. cap. 2. In the reign of E. 4 3 E. 4. cap. 5. 22 E. 4. cap. 1. In the reign of H 8. 1 H. 8. cap. 14. 6 H. 8. ca. 1. 7 H. 8. cap. 7. 24 H. 8. cap. 13. 33 H. 8. cap. 5. 37 H. 8. ca. 7. 1 & 2 Ph. and Mar. ca. 2. 4 & 5 Ph. and Mar. c. 2. 5 El. ca. 6. 8 El. ca. 11. 13 El. ca. 19. Some of them fighting with, and cuffing one another, ſome of them expired. But foraſmuch as thoſe that ſtood in force were obſolete, and remained but as ſnares to catch or vex men at the pleaſure of the promooter; at the parliament holden *anno* 1 Ja. all acts of parliament before that time made concerning apparell are repealed and abrogated, and ſince that time no act hath been made concerning apparell, and ſo ſtandeth the law at this day. Three coſtly things there are that doe much impoveriſh the ſubjects of England, viz. coſtly apparell, coſtly diet, and coſtly building. The beſt mean to repreſſe coſtly apparell, and the exceſſe thereof, is by example: for if it would pleaſe great men to ſhew good example, and to weare apparell of the cloth and other commodities wrought within the realm, it would beſt cure this vain, and conſuming ill, which is a branch of prodigality, and herewith few wiſemen are taken. If you will looke into the parliament roll of 2 H. 6. you ſhall ſee what plain and frugall apparell that renowned king H. 5. after he was king did wear, his gown of leſſe value then 40 s.

1 Jac. R. ca. 25.

Exceſſe of apparell is beſt cured, exemplo et virtuperio.

Rot. parl. 2. H. 6 nu. 30.

Magna corporis cura, magna animi incuria.

Non induetur mulier veſte virili, nec vir utetur veſte fœminea: abominabilis apud Deum, qui facit hoc.

Deut. 22. 5.

CAP. XCVI.

OF DIET.

THERE was [a] an ordinance made by king E. 2. by advice of his councell againſt the exceſſe of diet, but becauſe it had not the ſtrength of an act of parliament, it wrought no effect.

[b] It is provided by ſtatutes made in the reigns of E. 6. and queen Elizabeth, that no fleſh ſhall be eaten on fiſh-days, viz. Friday, Saturday, embring days and vigils, and the time of * Lent; [c] and for licences to eat fleſh on fiſh-days, &c. See the preamble of the ſtatute of 2 E. 6. ca. 19.

Embring days, ſo called becauſe in former times when they faſted they put aſhes or embers on their heads. Job 2. 12. Jer. 6. 26. 2 Sam. 13. 19. And as the naturall converſion of the fleſh of the body is to duſt, ſo the ſins of the ſoul (unrepented) are turned to fire, and this was ſhadowed under embers that ever keep fire.

* Theſe embring days are the week next before Quadrageſima, ſo called, for that it is the fortieth day before Eaſter, and is the firſt Sunday in Lent. So Quinquageſima the Sunday fifty days before Eaſter, Sexageſima ſixty days before Eaſter, and Septuageſima ſeventy days before Eaſter.

Before theſe late acts the eating of fleſh on Fridays was puniſhable in the eccleſiaſticall court, as yet it is, the juriſdiction being ſaved by the ſaid acts.

But there is no act of parliament againſt exceſſe of diet, for it is known to be ſo hurtfull for mans body, and ſo obſcureth the faculties of the mind, as the underſtanding, memory, &c. as to men, ſpecially to Chriſtian men, there needeth no law at all to be made, ever being mindfull of that caveat, [d] *Attendite autem vobis, ne forte graventur corda veſtra in crapula, et ebrietate, &c.*

[e] *Vigilia, et cholera, et tortura viro infrunito; ſomnus ſanitatis homini parco, dormiet uſque in mane, et anima illius cum ipſo delectabitur.* The morall heathen men by the light of nature agree hereunto. [f] *Tantum cibi et potus adhibendum eſt, ut reficiantur vires, non opprimantur.*

Accipe tu, victus tenuis quæ, quantaque ſecum
Afferat, imprimis valeas bene: nam variæ res
Ut noceant homini, credas, memor illius eſcæ,
Quæ ſimplex olim tibi ſederit: at ſimul aſſis
Miſceueris elixa: ſimul conchylia turdis:
Dulcia ſe in bilem vertent, ſtomachoque tumultum
Lenta ferret pituita: vides, ut pallidus omnis
Cœna deſurgat dubia? ———

Ex plenitudine generantur morbi, qui ſuperant medicorum artem.

King

[a] Rot. clauſ. 9 E. 2. m. 26 in dorſ. intitled *Ordinatio ſuper menſuration: ſarculorum.*

[b] 2 E. 6. cap. 19. 5 E. 6. ca. 3. 5 El. ca. 5. 27 El. ca. 11. 35 El. ca. 7.

* *Lent* 2. Saxon *Quinreſme Quadrageſima.*

[c] Hereof ſee the 4. part of the Inſtitutes, cap. The Court of Audience, &c. and Faculties.

* Vide Britton cap. 53. and other books make mention of theſe.

[d] Luc. c. 21. v. 34. Rom. ca. 13. v. 13. Eccleſiaſticus, ca. 37. v. 30, 31.

[e] Eccleſiaſticus 31. 20.

[f] Cicero.

Horace, 2. Ser. 2.

King Edgar permitting many of the Danes to inhabite here (g who firſt brought into this realm exceſſive drinking) was in the end conſtrained to make a law againſt this exceſſe (which never commeth alone) driving certain nails into the ſides of their cups, as limits, and bounds, which no man upon great pain ſhould be ſo hardy as to tranſgreſſe.

William of Malmeſbury, comparing Engliſhmen and Normans together, ſaith, that in his time, the Engliſh manner was to ſit bibbing whole houres after dinner, h and that the Norman faſhion was to walk the ſtreets with great troops, with idle and looſe ſervingmen following them, both which were cauſes of many diſorders and outrages.

i If the exceſſe of drinking extend to the loathſome and odious vice of drunkenneſſe, it is puniſhable by act of parliament. And to ſay the truth the ancient Britains were free from this crime.

Ecce Britannorum mos eſt laudabilis iſte,
Ut bibat arbitrio pocula quiſque ſuo.

And the laws againſt drunkenneſſe are very new.

Nothing is here ſaid againſt that great peacemaker, and branch of liberality, orderly hoſpitality, but againſt the dainty and diſorderly exceſſe of meats and drinks, which is a ſpecies of prodigality: for it is provided by act of parliament that the grace of hoſpitality ſhall not be withdrawn from the needy.

See the ſtatute of 37 E. 3. ca. 8. againſt exceſſive apparell and diet; but it was repealed in the next parliament, 38 E. 3. ca. 2.

g From whence exceſſe of drinking in England came.

h From whence troops of idle ſerving men came into England.

i 4 Jacobi, c. 5. See 1 Ja. ca. 9. 7 Ja. ca. 10. 21 Ja. c. 7. an excellent law. *Una ſatis ſanis nullam potare ſalutem.*

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W. 1. 3 E. 1. ca. 1.

CAP. XCVII.

OF BUILDINGS.

WE have not read of any act of parliament now in force made againſt the exceſſe of building, or touching the order or manner of building: but it is a waſting evill, whereunto ſome wiſe men are ſubject.

But the common law doth prohibit any ſubject to build any caſtle, or houſe of ſtrength imbatteled, &c. without the kings licence, for the danger that might enſue. a Alſo the common law prohibiteth the building of any edifice to a common nuſance, or to the nuſance of any man in his houſe, as the ſtopping up of his light, or to any other prejudice or annoyance of him. *Ædificare in tuo proprio ſolo non licet, quod alteri noceat.*

b In Deuteronomy it is ſaid, *Cum ædificaveris domum novam, facies c murum tecti per circuitum, ne effundatur ſanguis in domo tua, et ſis reus, labente alio, et in præceps ruente.*

d I like well the counſell to a nobleman, whoſoever gave it. *Si vis (ait ille) ædificare domum, inducat te neceſſitas, non voluptas; cupiditas ædificandi ædificando non tollitur; nimia et inordinata cupiditas ædificandi expectat ædificii venditionem; turris completa, et arca evacuata faciunt tarde hominem ſapientem.*

See the 1 part of the Inſtitutes. ſect. 1. fo. 5. a. Vet. Mag. Cart. 1. part, fo. 162. cap. Eſchaetry, &c. 14 H. 6. nu. 7. licence to the D. of Gloc. to imbattel Greenwich.

a Li. 9. f. 54 & 58. Lib. 5. fo. 101. &c.

b Deut. 22. 8.

c Battlements. This was for ſafety only.

d Bernhard. conſilium.

Ædificare

Euripides translated by Sir Th. Moor.

Ædificare domos multas, et pascere multos,
Est ad pauperiem semita laxa nimis.

To build many houses, and many to feed,
To poverty that way doth readily lead.

Of these three it hath been truly said: *Vestium, conviviorum, et ædificiorum luxuria ægre civitatis sunt indicia, et species prodigalitatis.*

But by the common law, and generall custome of the realm, it was lawfull for bishops, earls, and barons to build churches, or chappels within their fees: and hereof king John informed pope Innocentius the Third (naming only, *honoris causa*, the bishops and baronage of England, albeit this liberty extended to all) with request that this liberty to the baronage might be confirmed. To these letters the pope made this answer, *Quod enim de consuetudine regni Anglorum procedere regia serenitas per suas literas intimavit, ut liceat tam episcopis, quam comitibus, et baronibus ecclesias in feudo suo fundare, laicis quidem principibus id licere nullatenus denegamus, dummodo diocesani episcopi eis suffragetur assensus, et per novam structuram veterum ecclesiarum justitia non lædatur.* Whereas the baronage had absolute liberty before, now the pope addeth the consent of the bishop: but that addition bound not, seeing it was against the liberty of the baronage warranted by the common law: and we would not have rehearsed this epistle, but that it is a proof what the generall custome of the realm was concerning the building of churches by the baronage of England. And albeit they might build churches without the kings licence, yet could they not erect a spirituall politique body to continue in succession, and capable of indowment without the kings licence: but by the common law before the statutes of mortmain, they might have indowed this spirituall body once incorporated, *perpetuis futuris temporibus*, without any licence from the king, or any other.

Vide the like in the Regist. 36. b. Prohib. de decimis seperatis. In Epist. decret. Innocent. 3. l. 10. pag. 228.

Tr. 20 E. 1. Rot. 13 in banco Rich. de Turnys case. Eborum.

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And as the law is in cases of devotion and religion, so it is in cases of charity: any man may erect and build a house for an * hospitall, school, workinghouse, or house of correction, or the like, without any licence, for that is but a preparation, and may be done as owner of the soyl; but by the common law could not incorporate any of them without licence, but now he may, and indow them with lands in certain cases, [a] by the statutes of 39 Eliz cap. 5. and 3 Car. ca. 1. as in the second part of the Institutes in the exposition of those statutes it appeareth.

* Lib. 10. fo. 27. Le case de Suttons hospitall. See the statute of 39 El. cap. 4. whereby authority is given to justices of peace to build and erect houses of correction, &c.

[a] 39 El. ca. 5. 3 Car. ca. 1.

Concerning the building or erecting of [b] tombs, sepulchers or monuments for the deceased in church, chancell, common chappell, or churchyard in convenient manner, it is lawfull, for it is the last work of charity that can be done for the deceased, who whiles he lived was a lively temple of the Holy Ghost, with a reverend regard, and Christian hope of a joyfull resurrection. And the defacing of them is punishable by the common law, as it appeareth in [c] the book of 9 E. 4. 14. a. And so was it agreed by the whole court, Mich. 10 Jac. in the common place, between Corven and Pym. And for the defacing thereof, they that build or erect the same shall have the action during their lives, (as the lady Wiche had in the case of 9 E. 4.) and after their decease, the heir of the deceased shall have the action. But the building, or erecting of

[b] *Tumba, tumulus, sepulchrum.*

[c] 9 E. 4. 14. the La Wiches case, wife of Sir Hugh Wiche. Mich. 10. Ja. in communi banco int' Corven & Pym.

of the ſepulcher, tomb, or other monument ought not to be to the hinderance of the celebration of divine ſervice. And in that caſe of Corven it was reſolved, that albeit the freehold of the church be in the parſon, yet if a lord of a mannor, or any other, that hath an houſe within the town or pariſh, and that he, and all thoſe whoſe eſtate he hath in the manſion houſe of the mannor, or other houſe, hath had a ſeat in an iſle of the church, for him and his family only, and have repaired it at his proper charges, it ſhall be intended that ſome of his anncеſtors, or of the parties whoſe eſtate he hath, did build and erect that iſle for him and his family only; and therefore if the ordinary endeavour to remove him, or place any other there, he may have a prohibition. [d] It was further reſolved, that if any man hath a houſe in a town or pariſh, and that he and thoſe whoſe eſtate he hath in the houſe, hath had time out of mind a certain pew, or ſeat in the church maintained by him and them, the ordinary cannot remove him, (for preſcription maketh certainty, the mother of quietneſſe) and if he doe, a prohibition lyeth againſt him. [e] But where there is no preſcription, there the ordinary that hath the cure, and charge of ſouls may for avoiding of contention in the church or chappel, and the more quiet, and better ſervice of God, and placing of men according to their qualities and degrees, take order for the placing of the pariſhioners in the church or chappell publique, which is dedicate and conſecrate to the ſervice of God.

Barth. Caſſaneus fo. 13. Concluſ. 29. Actio datur, ſiquis arma in aliquo loco poſita delevit, ſeu abraſit, &c.

[d] 8 H. 7. 12. a. per Huſſy accord. Paſch. 10 Jac. in curia Cam. Stellatæ, inter Huſſy plaintiff. & Kath. Layton, & al' Defendants iſſint reſolve per le court.

[e] 8 H. 7. 12. a. acc. 12 H. 7. 12. per Huſſye.

Nota, funerall expences according to the degree and quality of the deceaſed, are to be allowed of the goods of the deceaſed, before any debt or duty whatſoever, for that is *opus pium*, or *charitativum*.

Amongſt the people of Almighty God, as it appeareth in the holy hiſtory, ſepulture was ever had in great reverence, not only of kings, but of other men; as (amongſt many others) good old Barzillai, when he had excuſed himſelf for not going with the king to Jeruſalem, he concluded, *Obſecro ut revertar ſervus tuus, et moriar in civitate mea, et ſepeliar juxta ſepulchrum patris mei, et matris meæ*,' &c. 2 Sam. 19 37.

And alſo the morall heathens had building and erecting of ſepulchers, or monuments in great account, as it doth appear by the ſeven wonders of the world, which for memory may be expreſſed in theſe few verſes.

1. *Pyramides Memphis*, 2. *Babylonis mœnia celſæ*,
3. *Templum ingens Epheſi virgo Diana tuum*,
4. *Mauſoli Cariæ monumentum*, 5. *Raraque Pharo*
Turris, 6. *Olympiaci ſplendida imago Jovis*,
7. *Denique apud Rhodios ſplendentis ſtatua Phœbi*:
Hæc ſeptem mundus mira, viator, habet.

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Beſides the religious, and Chriſtian regard aboveſaid, theſe monuments do ſerve for four good uſes and ends. Firſt, for evidence, and proof of deſcents, and pedegrees. Secondly, what time he that is there buried deceaſed. Thirdly, for example, to follow the good, or to eſchew the evill. Fourthly, to put the living in mind of their end, for all the ſons of Adam muſt die. *Statutum eſt hominibus ſemel mori.*

Monumentum

Monumentum ſervat alicujus rei memoriam aliter interituram, eamque nobis repræſentat: and therefore a monument is called a memoriall.

Monumentum dicitur à monendo; quicquid enim nos monet eſt monumentum, ut ſepulchrum, quòd nos ſumus mortales.

Cum tumulum cernis, tum tu mortalia ſpernis:
Eſto memor mortis, ſiſque ad cœleſtia fortis.

It is to be obſerved, that in every ſepulcher, that hath a monument, two things are to be conſidered, viz. the monument, and the ſepulture or buriall of the dead, * The buriall of the *cadaver* (that is *caro data vermibus*) is *nullius in bonis*, and belongs to eccleſiaſticall cogniſance, but as to the monument, action is given (as hath been ſaid) at the common law for defacing thereof.

* Britton, fo. 34. b.

In the year of our Lord 1586, and in the 28 year of the reign of that glorious queen Elizabeth, was the old gate called Ludgate in the city of London (as Stow ſaith) taken down to be new builded: there was found couched within the old wall thereof a ſtone, wherein was graven in the Hebrew tongue and characters, * an epitaph, ſignifying in Engliſh: This is the tomb of Rabbi Moſes ſon of the illuſtrious Rabbi Iſaac: which certainly was before the 23 year of the reign of H. 2. *anno Domini* 1177, for before that time all the Jews in England were buried within the city of London, and in that year, ſaith Hovenden, *Dominus rex pater dedit licentiam Judæis terræ ſuæ habendi cœmeterium in qualibet civitate Angliæ, extra muros civitatum, ubi poſſunt rationabiliter, et in competenti loco emere, ad ſepeliend' mortuos ſuos: prius enim omnes Judæi mortui Londoniâ ferebantur ſepeliendi.*

Stow in his Survey of London, fo. 19.
* For ſo is the truth.
Ro. Hovenden anno Dom. 1177.
Holl. eodem an. fo. 101. b. 20.

And albeit churches or chappels may be built by any of the kings ſubjects, (as hath been ſaid) without licence, yet before the law take knowledge of them to be churches or chappels, the biſhop is to conſecrate or dedicate the ſame: and this is the reaſon, that a church or not a church, a chappel, or not a chappel, ſhall be tryed, and certified by the biſhop.

8 H. 6. 32. 37.

See for this dedication or conſecration the 43 chapter of Ezechiel, the 23 chapter of Geneſis, the 90 Pſalme, the 24, 26, 27, 84, and 134 Pſalms, the 2 of Samuel 6. 10 of Saint John, verſ. 22. to the end.

Vide inter leges Edwardi Confeſſoris, cap. 3. Similiter ad dedicationes, ad ſynodos, et ad capitula venientibus, &c. in eundo, et redeundo ſit ſumma pax.

De ſubterraneis, ſubſtructionibus, et cryptis.

We find in ancient times that vaults, hollow places, or ſubſtructions under the ground were made by men for receits, or receptacles for keeping of their wives, children, money, and goods ſecret, to avoide violence, and rapine in time of hoſtility or rebellion, and we find no law againſt them.

Tacitus.

Theſe kind of buildings we had from the Germans, as we find it in Tacitus, who treating of the old Germans ſaith, *Solent et ſubterraneos ſpecus aperire, et ſi quando hoſtis advenit, aperta populatur, abdita autem et defoſſa aut ignorantur, aut eo ipſo fallunt, quod quærenda ſunt.* They uſe to build vaults under the earth, and if the enemy come, he deſtroyeth all open and above ground, but ſuch things as lie hidden in the cave, either they lie unknown, or at leaſt they deceive him, in that he is enforced to find them out.

Neither have we found any licence of the king to make them, nor puniſhment of any that made them without licence, and yet many have been made by many ſubjects, ſome whereof * we have ſeen.

* In the mannor of Minſter Lovel in com'] Oxon' &c.

[a] We read of Alexander biſhop of Lincoln, in the reigns of H. 1. and king Stephen, a Norman born, who was, *inſanis ſubſtructionibus ad inſaniam delectatus.*

[a] Cambden Linc. pag. 406.

[b] No perſon can build or erect light-houſes, pharos, ſea-marks or beacons without lawfull warrant and authority.

Lumina noctivagæ tollit pharus æmula lunæ.

In light-houſe top is rear'd the light,
As high as the moon that walkes by night.

[b] See the ſtatute of 8 El. ca. 13. and the letters patents of the Lord Admirall.

[c] Proviſion was made by authority of parliament for building and erecting blockhouſes, bulwarks, piles, and the like, for without parliament ſubjects cannot be charged with building [d] or erecting of them, and that act is expired.

[c] 4 H. 8. ca. 1.

[d] De propugnaculis, munimentis, munitoriis, &c. of bulwarks, barbicans, blockhouſes, piles, &c.

[e] The lord of the ſoil may build a windmill, ſheepcote, dairy enlarging of a court neceſſary, or a curtilage in grounds, where men have common of paſture.

[f] A man cannot erect any building upon his own ground in the kings foreſt, but it is a purpreſture, and may either be demoliſhed or arrented to the kings uſe, &c. at a juſtice ſeat.

[e] 13 E. 1. ca. 46. 32 Aſſ. 5. 7 H. 4. 39.

[f] 7 El. Dier 240.

Concerning houſes of huſbandry and tillage, the ſtatutes of 4 H. 7. cap. 19. 7 H. 8. ca. 1. 27 H. 8. ca. 22. 5 E. 6. ca. 5. 5 El. cap. 2. are repealed by the ſtatute of 21 Jac. cap. 28. and the ſtatutes of 39 El. ca. 1. & 2. are expired, for that they were ſo like labyrinthes, with ſuch intricate windings and turnings, as little or no fruit proceeded of them.

[g] No man can erect an houſe or building to the nuſance of any other.

[g] See the 2. part of the Inſtitutes. W. 2. ca. 24. lib. 5. fo. 101. lib. 8. fo. 46. lib. 9. fo. 54. 58.

[h] See where a man hath any houſe or mill, &c. and having any priviledge or thing appurtenant thereunto, and pull it down and build a new, where the priviledge or appurtenant remain and where not.

[h] See lib. 4. f. 84. Lutterels caſe, and the authorities there cited.

[i] Concerning the erecting, &c. of cotages, ſee the ſtatute of 31 El. ca. 7. which could not be reſtrained in ſuch ſort as they are, but by authority of parliament.

[i] 31 Eliz. ca. 7.

There was a ſtatute made *anno* 35 El. (when I was ſpeaker) againſt buildings in the cities of London or Weſtminſter, or within three miles of the gates of the city of London, and againſt the dividing and converting of any dwelling houſe or building into divers habitations, and againſt inmates, but that endured but for ſeven years, and until the end of the next ſeſſion of parliament, which act, being holden dangerous, was not continued at the ſeſſion of parliament holden in 43 *Eliz.* being the next ſeſſion after the ſeven years, and therefore expired with the ſame. In the mean time there was a law made againſt new buildings, &c. which then was a warrant, and ſince hath been a colour for divers proceedings in courts of juſtice, not obſerving the expiration of that law; but now that law hath long ſince loſt his force, and the ancient and fundamentall common law is to be followed.

Sylliva, or *ſulliva* is a word derived from the Saxon *ſylle*, and ſignifieth a poſte, or plate fixed in the ground: the Saxon word

Lamb. perambulation of Kent. Theſe words, you ſhall read in records concerning priviledges.

word is not yet out of uſe, for every man knows what a groundſille is.

Pera, a peer, derived from the Latin word *petra*: *plance*, of the Engliſh word, planks, for boords or tables, in uſe alſo at this day.

Having ſpoken of erecting of houſes and buildings, &c. we will tell you what we find in our books and records of dilapidation, and decay of buildings.

[k] Dilapidation of eccleſiaſtical palaces, houſes, and buildings is a good cauſe of deprivation.

k 29 E. 3. 16. 2 H. 4. f. 3. 9 E. 4. 34.

[l] It appeareth by the ſtatute of 4 H. 4. cap. 2. that *depopulatores agrorum* were great offenders by the ancient law, and that the appeal or indictment thereof ought not to be generall, but in ſpecial manner; and provides, that the offenders therein might have their clergy. They are called *depopulatores agrorum*, for that by proſtrating or decaying of the houſes of habitation of the kings people, they depopulate, that is, diſpeople the towns.

l 4 H. 4. ca. 2. lib. 11. fo. 29. Alex. Poulters caſe.

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Prohibitio regis quòd incolæ de villa de Southampton non proſternent domos ſuas in alias migraturi regiones.

Simile pro magna Jermenutha.

Dorſ. Clauſ. an. 43 E. 3. m. 23. Rot. Clauſ. anno 21 R. 2. m. 15.

That which may lawfully be prohibited before it be done, may be juſtly puniſhed after it be done.

And herewith we will cloſe up this chapter: that the law doth favour the ſupportation of houſes of habitation, and uſe for mankinde.

First part of the Inſtitutes, f. 54. b. 56. b.

CAP. XCVIII.

De Lupanaribus et Fornicibus, &c.

Brothel-houſes, Eſtuis, Bordelloes.

THE keeping of them is againſt the law of God, on which the common law of England in that caſe is grounded. * *Non offeres mercedem proſtibuli, nec precium canis in domo Dei tui, &c. Quia abominatio eſt utrumq; apud dominum Deum tuum.*

* Numb. 25. 9. Deut. 23. 18. Ezek. 16. 24. 31. 39. Joël 3. 3. 2. Mach. 4. 12. Hoſpes meritricum Lena. Leno, unde Lenocinium.

And the keeper, he or ſhe, of ſuch houſes is puniſhable by indictment at the common law by fine and impriſonment: for although adultery and fornication be puniſhable by the eccleſiaſticall law, yet the keeping of a houſe of bawdrie or ſtewes, or brothell-houſe, being as it were a common nuſance, is puniſhable by the common law, and is the cauſe of many miſchiefs, not only to the overthrow of the bodies, and waſting of their livelyhoods, but to the indangering of their ſoules. For the miſchiefs enſuing hereupon, ſee 11 H. 6. cap. 1. 1 H. 7. fo. 6. 12. 13 H. 7. 6. 27 H. 8. Rot. Parl. 14 R. 2. nu. 32.

By proclamation under the great ſeale 30 Martii. 37 H. 8.

King H. 8. ſuppreſſed all the ſtewes or brothel-houſes, which long had continued on the Bankſide in Southwark, for that they were (as hath been ſaid) prohibited by the law of God, and by the law of this land. And thoſe infamous women were not buried in Chriſtian

Chriſtian buriall when they were dead, nor permitted to receive the rites of the church whileſt they lived.

The word *eſtuis* or *ſtewes* is French, we having no Engliſh word for it.

Before the reigne of H. 7. there were eighteen of theſe infamous houſes, and H. 7 for a time forbad them: but afterwards twelve only were permitted, and had ſignes painted on their wals; as a Boares Head, the Croſs Keyes, the Gun, the Caſtle, the Crane, the Cardinals Hat, the Bell, the Swan, &c. Fabian Chron. Stowe.

Many wicked and common women had ſeated themſelves in a lane called Water-lane, next to the houſe of the friers Carmelites in Fleet-ſtreet: this being an open and known wickedneſſe, king E. 3. to the end theſe friars might performe their vowes, one of which was, to live in perpetuall chaſtity, took order for removing of theſe women. The record ſaith, *Rex præcipit majori civitatis London quod amoveri faciat omnes mulieres meretrices in venella prope fratres Carmelitarum in Fleteſtreet inhabitantes.* In Dorſ. Clauſ. 21 E. 3. part 1. m. 6. Fratres beatæ Mariæ de Monte Carmeli, called White Fryers.

Read 3 Regum cap. 14. verſe 24. eodem lib. cap. 15. verſe 12. & 4 Regum cap. 23. verſe 7.

And by the common law it appertaineth to the marſhall of the kings houſe to free, or protect the court from *femes puteins*, which is more particularly explained by Fleta, who ſaith, *Mareſchalli intereſt virgatam à meretricibus omnib' protegere et deliberare, et habet mareſchallus ex conſuetudine pro qualibet meretrice coi. infra metas hoſpitii inventa, 4d primo die; quæ ſi iterum in baliva ſua inveniatur, capiatur et coram ſeneſchallo inhibeatur ei hoſpitium regis, reginæ, et liberorum ſuorum, ne iterum ingrediatur, et nomina earum imbrevientur: quæ ſi iterum inventæ fuerint hoſpic' ſequutrices, tunc aut remaneant in priſona in vinculis, aut ſponte prædic' hoſpicia abjurentur; quæ ſi autem tertio inventæ fuerint, conſiderabitur quod amputetur eis treſſoria, et tondeantur; quæ quidem ſi quarto inveniantur, amputentur eis ſuperlabia, ne de cætero concupiſcantur ad libidinem.* 7 E. 3. fo. 23, 24. Fleta lib. 2. cap. 5. lib. 10. Le caſe de Marſhalſea, fo. 77. [206]

14 R. 2. It is enacted that no eſtews or brothel-houſes ſhould be kept in Southwark, but in the common places therefore appointed. Rot. par. 14 R. 2. nu. 32.

So odious and ſo dangerous was this infamous vice (the faireſt end whereof is beggery) that men in making of leaſes of their houſes, did adde an expreſſe condition, that the leſſee, &c. ſhould not ſuffer, harbour, or keep any *feme puteine* within the ſaid houſes, &c. 35 H. 6. Barre 162.

See the caſe of 1 H. 7. the cuſtome of London for entring into an houſe, and arreſting of an advowtrer, and carrying her to priſon. In ancient times adultery and fornication were puniſhed by fine and impriſonment, and inquirable in turnes and leets by the name of Letherwite. We find in Domeſday *De adulterio vero per totum Chent, habet rex hominem, (i. amerciamentum hominis) et archiepiſcopus mulierem, (i. amerciamentum mulieris) &c.* 1 H. 7. fo. 6. &c. Domeſday. Chent. Dover.

Vidua, ſi alicui ſe non legitime commiſceb. 20 s. emendabit, puella vero 10 s. pro conſimili cauſa. Ibid. Ceſtriæ civitas.

Adulterium faciens 8 s. & 4 d. emendabit homo, et fœmina tantundem. Ibid. Sudſex Lewes.

Rex habet hominem adulterum, archiepiſcopus fœminam. Domeſday. Huntedoneſc. Bracton. Fleta.

But now theſe offences belong to the eccleſiaſticall court. Raſtall term.

Legrewita, or *logrewita*, *legergeld*, or *logergeld*, of *legre* or *logre* for a bed, leg. Stat. de expoſit. vocab.

a bed, and *wite amerciament*, by common speech *letherwite*, or *lairewite*, *lierwite*, *lotherwite*.

Childewite is for the lord to take a fine for his bondwoman defiled and begotten with childe.

Bawdry, *lenocinium*, *unde ribawdry et ribaude*. i. *Impudicus rabula*. See parliam. 50 E. 3. nu. 61. of ribauds and robertsmen.

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CAP. XCIX.

De Assentatione, Fucologia, Pseudologia, Flattery.

Int. leges Canuti, fo. 106. c. 7. Lam. Fatalis magnarum potestatum pestis, adulatio. Semper assentor id, quod is ad cujus voluntatem dicitur, esse magnum; ut in Terentio: magnas vero agere gratias mihi, &c. satis erat respondisse magnas, ingentes inquit.

WE find a law before the conquest against flatterers in these words, Lıccenaꝛ ⁊ Leoʒonaꝛ nepenaꝛ ⁊ neaꝼanaꝛ ʒoɒeꝛ ʒnaman habban, &c. which Dr. Lambard translateth thus, *Assentatores, mendaces, prædones, et rapaces offensionem Dei gravissimam incurrant, &c.*

The ancient manuscript translateth it thus, *Seductores, mendaces, rapaces et raptores Dei gravamen habeant*. And both translations do in effect agree, for a flatterer is a seducer for some private end, by fained praise and humouring of another, whereby he hath an *oultrecuidance* of himselfe, his state, and actions, *isti ducunt et seducunt*.

The occasion of making this law was, that king Canutus had been seduced by flatterers, who had shewed him his face and state in a false glasse, making too great a shew of his own parts, actions, and state, to the end to make him conceit himselfe to be better and greater then he was, and his adversaries lesse, then in truth they were. Nay, this king by wicked flatterers assumed to him divine power and honour: for comming from sea, he set his feet on the sea strond, as the sea was flowing, and commanded the sea not to rise to wet his lordly and majestick feet nor clothes: the sea keeping on his accustomed course, both wet his feet and thighs also: whereat being sore amazed repented his presumption (which he had undertaken by wicked flattery.)

And well is the flatterer marshalled in this law with lyers, thieves, and raveners; for the divine described flatterers to be those, *Qui colunt aliquem, et auferunt ab eo aliquid temporarii boni*. So as it is *peccatum viscatum*, it getteth away much and giveth smoke.

And the Holy Ghost hath styled flattery *oleum peccatoris*, that is, the oile of the sinner, κατ' ἐξοχὴν, that is, of him that exceedeth others in sinne, and doth affect greatnesse, that is the head, making it greater and more prosperous then it is, as you may reade in the prophet David: *Corripiet me justus in misericordia, et increpabit me, oleum autem peccatoris non impinguet caput meum*. Whereby he being both a king and a prophet, preferreth the reproofe, nay the sharpe rebuke of the just and vertuous, before the smooth humouring of the

Psal. 141. 5.

the flatterer *(per nomen)* of the ſinner. This *oleum peccatoris* is *mel venenatum, et venenum mellitum*, and commonly affecteth greatneſſe, and is called lordbane.

And againe, David ſpeaking of the flatterer ſaith, his words are ſmoother then oile, and yet are they very ſwords. *Hæc dicit Dominus Deus, Væ qui conſuunt pulvillos ſub omni cubito manus, et faciunt cervicalia ſub capite univerſæ ætatis ad capiend' animas, &c.* Thus ſaith the Lord God, Woe to them that ſow pillowes under all armeholes, and put kerchifes upon the heads of every age to hunt ſoules. They make the king glad with their wickedneſſe, and the princes with their lyes. *In malitia ſua lætificaverunt regem, et in mendaciis ſuis principes.* Pſal. 55. 22. Ezech. 13. 18. Oſee 7. 3.

The flattering mouth worketh ruine. And more kings and kingdomes have been overthrown by the means of flattery, then by publick hoſtility. And this is the cauſe that we have mentioned the ſaid ancient law for their puniſhment, they be lawfully baniſhed from princes courts, and ſubjects houſes. Prov. 26. 28. Qu. Curtius.

Ut videat, cæco fit ſimia præda leoni:
Rex cæcus cernit, cum ſycophanta perit.

What fearfull ends flattering favourites, corruptors of their ſoveraigne liege lords, abuſing their favours in ſubverſion of their lawes, have had, appeareth in our parliament rolls, records, and hiſtories. [208]

Nota, enemies to lawes puniſhed by the lawes.

[a] King H. 3. had Hubert de Burgo chiefe juſtice and earle of Kent, and many others: but this was his ſafety, that upon juſt occaſion without any great grief he could forgoe a favourite. See in the preface to the ſecond part of the Inſtitutes, his counſell to H. 3. to burne Magna Carta.

[a] Rot. pat. anno 17 H. 3. m. Nos integre et firmiter tenebimus judicium de Huberto de Burgo, per barones datum. Speed 18 H. 3. 520.

E. 2. had [b] Pierce de Gaveſton, the [c] Spencers, &c. and the Spencers proceedings againſt *le grand charter* by name (amongſt other things) tending to the ſubverſion of law, &c.

[b] Rot. parl. 7 E. 2. Ne quis occaſionetur per mortem Pet. de Gaveſton. Hil. 318. a. & ibid. 321. a.

[c] Vet. Mag. Cart. 2 part 44. ib. 50. exilium Hugonis, & 54. Ne quis occaſionetur pro feloniis in proſecutione d'Spencer patris & filii.

R. 2. had [d] ſir Robert Treſilian chiefe juſtice, &c. and Robert earle of Oxford and duke of Ireland, &c.

[d] Rot. par. 11 R. 2. nu. 8. &c.

H. 6. had [e] William de la Pole duke of Suffolk, &c. who endeavoured to have brought in the civill lawes, which was the occaſion that the chiefe juſtice Forteſcue wrote in the commendation of the lawes of England, preferring them for the government of this land before the civill lawes. This duke with others plotted the death and deſtruction of Humfrey the good duke of Glouc. who ever ſtood in his way.

[e] Rot. par. 28 H. 6. nu. 19. untill 47.

E. 4. had [f] William lord Haſtings the kings chamberlaine, and captaine of Callice. All theſe came to fearfull and untimely ends.

[f] Holinſh. 713. a. 30.

R. 3. had [g] Sir John Cateſby one of the juſtices of the common place, and Henry duke of Buck. &c. privy plotters and counſellors with R. 3. for the moſt execrable murder of his nephews E. 5. and Richard duke of York. What a miſerable end the duke had, you know: and juſtice Cateſby in his journey to London, in the kings high way had *ſubitaneam et improviſam mortem.*

[g] Ho.lenſh. 722. 748. 767. a. The like indict-

H. 7. had [h] Sir Richard Empſon, Edmond Dudley, &c. Sir

2 H. 7. 10. [h] Coram rege an. 1 H. 8. In information verſ. D. Peter & alios. ment againſt Edw. Dudley.

Richard Empſon was indicted, *Quod ipſe conſiliarius excellentiſſimi principis Henrici nuper regis Angliæ ſeptimi Deum præ oculis non habens, ſed ut filius diabolicus ſubtiliter imaginans honorem, dignitatem, et proſperitatem dicti nuper regis, ac poſteritatem regni ſui Angliæ minime valere, ſed ut ipſe magis ſingulares favores dicti nuper regis adhibere, unde magnat' fieri potuiſſet, ac totum regnum Angliæ ſecundum ejus voluntatem gubernare, falſo, deceptive, et proditorie legem Angliæ ſubvertens, diverſos ligeos ipſius nuper regis, ex ſua falſa covina, et ſubtili ingenio, contra communē legē regni Angliæ de diverſis feloniis, &c. indictari fecit, &c. per quod plures et diverſi populi dicti nuper regis hiis gravaminibus, et indebitis exactionib' multipliciter torquebantur, in tantum quòd populi dicti nuper regis verſus ipſum nuper regem multipliciter murmurabant, et malignabant, in magnum periculum ipſius nuper regis regni ſui Angliæ, ac ſubverſionem legum et conſuetudinum ejuſdem regni, &c.* And the like indictment was againſt Dudley.

Tr. 23 H. 8. coram rege. Rot. 14.

H. 8. had Thomas Woolſey cardinall. *Ipſe intendens finaliter antiquiſſimas Angliæ leges penitus ſubvertere, et enervare, univerſumq; hoc regnum Angliæ et ejuſdem regni populum legibus imperialibus, vulgo dict', legibus civilibus, et earundem legum canonibus ſubjugare et ſubducere, &c.*

We will for ſome cauſes deſcend no lower. *Qui eorum veſtigiis inſiſtunt, eorum exitus perhorreſcant.*

But that right be done to him, who was a faithfull favorite and counſeller to this king, we have ſeen a manuſcript that relateth, that Charles Brandon duke of Suffolk a wiſe and warlike perſon, was for many years before his deceaſe the greateſt favourite the king had, upon whom he chiefly relied in all his weightieſt affairs. This noble duke deceaſed in Auguſt in the 37 year of the reign of king H. 8. After whoſe death the next time the king ſat with his councell, and miſſing the good duke, grievouſly lamented for him, and ſaid, that when I was offended with any (as often I was) and acquainted him therewith, that he ever endeavoured to mitigate my diſpleaſure, and never ſpake to me evill of any of them. And the king looking upon the lords of his councell one after another, ſaid, and ſo (my lord) cannot you ſay, peruſing them all throughout. A royall commendation of this great Duke, and a great argument of his piety and honour, that no ſubject had ever the indignation or diſpleaſure of his ſoveraign, by any private whiſpering of his.

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Anno 5 R. 2. Th. Walſ. p. 281.

We will conclude this chapter with one of our own hiſtories. *Generaliter cunctorum habitatorum terræ peccatis inclusive ordines ſumendo mendicantium ad cumulandum cauſas malorum, &c. iſti poſſeſſionatis invidentes, procerum crimina approbantes, commune vulgus in errore foventes, et utrorumque peccata comedentes, pro poſſeſſionibus acquirendis, qui poſſeſſiones renunciaverant pro pecuniis congregandis; qui in paupertate perſeverare juraverant, dicunt bonum malum, et malum bonum, ſeducentes principes adulationibus, plebem mendaciis, et utroſque ſecum in devium pertrahentes, &c.* Note what is ſaid, that the full heap of the cauſes of Gods vengeance in thoſe days, was made up by thoſe flattering preaching friers. But parliaments, palaces of princes and pulpits ſhould be free from adulation and flattery.

Read the ſtory, and ſee the moſt lamentable eſtate of thoſe times. Note theſe three PPP.

CAP.

CAP. C.

Of falſe Impriſonment.

SEE the ſecond part of the Inſtitutes, the ſtatute *de* 1 E. 2. *de frangentibus priſonam*, and the expoſition upon the ſame.

See the Petition of Right 3 Car. regis, and Mag. Cart. ca. 29. And it is to be obſerved that before the conqueſt it was thus provided. *Qui hominem paganum immerentem vinculis conſtrinxerit, 10 ſolidis noxiam ſarcito; eum ſi verberibus affecerit, 20 ſolidorum pœna eſto; ſi ſuſpenſum in ſublime rapuerit, 30 ſolidis culpæ penſatur; ſi contumelioſe capillum ejus morionis in morem totonderit, 10 ſolid' præſtato; ſin caput in morem ſacerdotis raſerit, nec ipſum ligaverit, 30 ſolidos numerato; ſi barbam illi reſecarit, 20 ſolidorum compenſatio ſequitor; ſi denique ei vinculis conſtricto capillos in morem ſacerdotum abraſerit, 60 ſolidos pendito.* Int. leges Alvredi cap. 31.

By way of addition, here it is neceſſary to be known, how and by what means one that is in priſon may be diſcharged Every man that is in priſon, either is impriſoned without lawfull *mittimus* (whereof we have ſpoken before *ubi ſupra*, and how he may be freed from impriſonment in that caſe) or with lawfull *mittimus*. He, that is lawfully impriſoned, is either impriſoned by lawfull commandement, and order or warrant, or by the kings writ: by commandment and order of any court of record; and this commandment, warrant or writ is either for cauſes not being treaſon or felony, miſpriſion of the ſame, nor other publique offence or cauſe, or inferiour cauſes to theſe; as contempts, private actions or ſuits. If any court of record commit a man for a contempt done in court, they may diſcharge him by like order at their pleaſure: but if they having authority, doe commit him for treaſon, felony, or other crime, or for ſuſpition of the ſame, they cannot diſcharge him, untill he be inquired of, and either indicted and acquited, or an ignoramus found, and delivered by proclamation. [a] And ſo it is if any be taken and impriſoned by lawfull warrant, or the kings writ for treaſon, felony, or other crime, &c. he cannot be diſcharged by any without legall proceeding (but by the king only.)

[a] For bailment See the ſtatute of Mag. Cart. ca. 29. W. 2. ca. 15. and the expoſition thereof.
1 & 2 Ph. and Mar. ca. 13.
2 & 3 Ph. and Ma. cap. 10.

[b] If a vagrant, refuſing to ſerve, had been committed to priſon upon the ſtatute of 23 E. 3. of labourers by the lord of the town, or juſtice of peace, they might have diſcharged him, even as the chancellour, &c. may commit a man for a contempt before him in court, and diſcharge him again at his pleaſure.

[b] 14 H. 6. 8. F. N. B. 167. b. See 12 H. 6. 3.

[c] If a man be taken by the kings writ in an action of debt or another private action, the plaintif may diſcharge the gaoler of him, and ſet him at liberty, though he be in execution: but if he be taken in an appeal of death, robbery, rape, * &c. the plaintif cannot diſcharge him, becauſe it is a publique offence, wherein the king hath an intereſt, and he may after nonſuit by the plaintif be arraigned at the kings ſuit.

[c] Mich. 13 Jac. in banke le Roy. Int. Withers & Herly, adjudge accord.
27 H. 8. 28. b.
1 R. 2. ca. 12.
10 H. 7. 3. a. per Vavaſor.
13 E. 3. Bar. 253.

There are two great adverſaries to the due execution of theſe laws (as

(as before hath been touched) especially in criminall causes, viz. *præcipitatio, et morosa cunctatio.* Precipitation; as a man or woman to be committed to prison, and within so short a time to be indicted and arraigned, as it is not possible for them to send for, or procure their witnesses; this certainly is precipitation; for the law both in reall and personall actions doth give the party tenant or defendant a convenient time without respect of persons to answer, &c. much more it ought to be in case of life, *Nec unquam in judiciis tantum eminet periculum, quantum parit processus festinatus:* and again, *crebra in deliberationibus judicia maturescunt, in accelerato processu nunquam*, and specially in case of life. As for *morosa cunctatio*, froward or weyward delay; see the second part of the Institutes, Glouc. ca. 2. 9. And we will conclude this chapter with the rule of law, *Quòd in criminalibus, probationes debent esse luce clariores.*

Forteſcue ca. 53. 16. 127. b.

CAP. CI.

Of Judgements and Execution.

JUDICIUM is derived *à jure, et dicto, et est quasi juris dictum* and therefore if the judgement be erroneous, both the judgement and execution thereupon, and all the former proceedings shall be reversed by writ of error: but if the former proceeding and judgement be good, if the execution be erroneous, the execution shall only be reversed: and because the judgement is the guide and direction of the execution, we shall treat principally of the judgement, and incidently of execution.

Of judgements, some be by the common law, and some by statute law, and some by custome.

Of judgements by the common law, some be in criminall causes, or pleas of the crown, concerning the life of man (whereof we are principally to intreat,) and of these some be expressed, and some implied. Other judgements at the common law be in actions reall and mixt, of which, some be *judicia interlocutoria*, and some *ultima seu principalia*: and again, *de principalibus, quædam sunt finalia, et quædam non sunt finalia.* Of judgements by statutes, some be in criminall causes, and some in common pleas; but judgements by custome are only in common pleas.

All pleas of the crown, concerning the life of man, are divided into treason and felony; and treason, into high treason, and petit treason; and felony into all the severall branches aboveſaid. And as in the case of high treason, (as it hath before appeared) some be far more horrible and odious then other, yet (one case excepted, as before hath appeared) one and the same judgement is given for all. So in cases of petit treason, one judgement is given in all, nay in all the severall cases of felony, though some be far more hainous then other, yet all being but felony, one and the same judgement is given. See the judgement and forfeiture in cases of treason, felony, &c. in the severall titles thereof, these we will adde.

6 El. Dier 230. See before in the chapter of Treason.

Judgement

Judgement in High Treaſon.

Pl. Com. 383. b. See Stanford 38. d. e. lib. Int. Co. 361.

*Et ſuper hoc viſis, et per curiam hic intellectis omnibus & ſingulis præmiſſis, * conſideratum eſt, quòd prædictus R. uſque furcas de T. 1 trahatur, et 2 ibidem ſuſpendatur per collum, et vivus ad terram proſternatur, et 3 interiora ſua extra ventrem ‡ ſuum capiantur, 4 ipſoque vivente comburantur, et 5 caput ſuum amputetur, quodque 6 corpus ſuum in quatuor partes dividatur; ac 7 quod caput et quarteria illa ponantur, ubi dominus rex ea aſſignare vult.*

* See the book of Judges cap. 19. ver. ult. Conſider, conſult, and give ſentence.

19 H. 6. 47. Trahe, pende, et diſſolve. Bract. li. 3. fo. 118, b. *Crimen læſæ majeſt. ut ſi contra perſonam ipſius regis ſit præſumptum, quod quidem crimen omnia alia crimina excedit quoad pœnam.* Idem. l. 3. f. 104. b. maketh mention of execution, *laqueo et ſecuri*, parliam. 21 R. 2. inter placita coron. nu. 50.

‡ [211]

35 H. 8. Br. Forfeiture. 59.

Implied in this judgement is, firſt, the forfeiture of all his manors, lands, tenements, and hereditaments in fee-ſimple, or fee-tail of whomſoever they be holden. Secondly, his wife to loſe her dower. Thirdly, he ſhall loſe his children (for they become baſe and ignoble.) Fourthly, he ſhall loſe his poſterity, for his blood is ſtained and corrupted, and they cannot inherit to him or any other anceſtor. Fifthly, all his goods and chattels, &c. And reaſon is, that his body, lands, goods, poſterity, &c. ſhall be torn, pulled aſunder, and deſtroyed, that intended to tear, and deſtroy the majeſty of government. And all theſe ſeverall puniſhments are found for treaſon in holy ſcripture.

1 Reg. 2. 28. &c. *Joab tractus, &c.* — Drawing.

Eſther, 2. 22, 23. *Bithan ſuſpenſus, &c.* — Hanging.

Acts, 1. 18. *Judas ſuſpenſus crepuit medius, et diffuſa ſunt viſcera ejus.* — Bowelling.

2 Sam. 18. 14, 15. *Infixit tres lanceas in corde Abſalon cum adhuc palpitaret, &c.* — The heart, &c. while he lived.

2 Sam. 20. 22. *Abſciſſum caput Sheba filii Bichri.* — Beheaded.

2 Sam. 4. 11, 12. *Interfecerunt Baanan et Rechab, et ſuſpenderunt manus et pedes eorum ſuper piſcinam in Hebron.* — Quarters hanged up.

Corruption of blood, and that the children of a traitor ſhould not inherit, appeareth alſo by holy ſcripture. — Damnatæ memoriæ.

Pſal. 109. 9, 10, 11, 12, 13. *Mutantes transferantur filii ejus, et mendicent, et ejiciantur de habitationibus ſuis, et diripient alieni labores ejus, et diſpereat de terra memoria ejus.*

[a] The judgement of a woman for high treaſon is to be drawn and burnt.

[b] Sir Andrew Harkley earl of Carliſle, convicted, degraded and attainted of treaſon.

[a] 25 E. 3. 42. b. Coron. 130. Brit. ca. 8. f. 16. b. accord. [b] *Degradation.* Hil. 18 E. 2. Coram rege rot. 34, 35. Walſing. p. 118.

Judgement in Petit Treaſon, where he is convicted thereof by Verdict or Confeſſion.

19 H. 6. 47. Com. Cæſar. ante Chriſtum natum 1600 annis, what the judgement was for petit treaſon. 1 R. 3. f. 4. 25 E. 3. 42. 12 Aſſ. 30.

Super hoc viſis, &c. ut ſupra, conſideratum eſt, quod prædictus R. uſque furcas de T. trahatur, et ibidem ſuſpendatur per collum, quouſque mortuus fuerit.

But a woman is to have judgement to be drawn and burnt, as well in caſe of petit treaſon as high treaſon, and ought not to be beheaded,

beheaded, or hanged. *De morte mariti ſi compertum eſt uxorem, &c. igne Britanni interficiunt.*

Bracton, li. 3. fo. 105. a. *Igne concremantur qui ſaluti dominorum ſuorum inſidiaverint,* idem fo. 104. b.

Judgement in Felony, where he is convicted thereof by Verdict or Confeſſion.

6 E. 4. 4. a. & b. See the Preface to the ſixt part of Reports, what the law was before the conqueſt anno domino 995. in caſe of felony.

Et ſuper hoc viſis, &c. ut ſupra, conſideratum eſt quòd prædictus R. ſuſpendatur per collum, quouſque mortuus fuerit. Bracton, lib. 3 fo. 104. b. ſpeaketh, *de laqueo.*

And it is a maxime in law, that execution muſt be according to the judgement, *Ea quæ in curia noſtra rite acta ſunt, debit' executioni demandari debent:* * and for expreſſe authority, *non licet felonem pro felonia decollare;* and yet ſome examples are to the contrary.

* Paſch. 20 R. 2. coram rege, rot. 1. Lincoln.

True it is that the lord of Hungerford of Heyteſbury was in 32 H. 8. attainted of buggery, and had judgement to be hanged by the neck, untill he was dead; and yet on the twenty eight day of July in the ſame year was beheaded at the Tower Hill. But as true it is, that Thomas Fines lord Dacres of the South, in *anno* 33 H. 8. was attainted of murder, and had judgement to be hanged by the neck, untill he was dead, and according to the judgement was hanged at Tiborn the twenty eight of June in the ſame year. And true it is, that Edward duke of Somerſet was attainted of felony in *anno* 5 E. 6. and had judgement to be hanged by the neck untill he was dead, and on the twenty ſecond of February in the ſame year was beheaded at the Tower Hill. And as true it is, that 3 & 4 Ph. and Mar. the lord Stourton was attainted of murder, and had judgement to be hanged by the neck untill he were dead, and according to the judgement, the ſixth of March in the ſame year was hanged.

See before cap. Murder.

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In caſe of high treaſon, beheading is part of the judgement, and therefore the king may pardon all the reſt ſaving beheading, as is uſually done in caſe of nobility. But if a man being attainted of felony, be beheaded, it is no execution of the judgement, becauſe the judgement is, that he be hanged, untill he be dead. In this caſe the judgement doth belong to the judge, and he cannot alter it, the execution belongs to the ſherif, &c. and he cannot alter it. And if the execution might be altered in this caſe, from hanging to beheading, by the ſame reaſon it might be altered to burning, ſtoning to death, &c. To conclude this point, *Judicandum eſt legibus, non exemplis,* and *judicium eſt juris dictum, et executio eſt executio juris ſecundum judicium.*

The forfeiture in caſe of petit treaſon and felony (which is implied in the judgement) is all one, which you may read in the firſt part of the Inſtitutes. ſect. 747.

Deut. 2. 13. Vide Hil. 1 H. 5. Rog. Actons caſe.

Quando peccaverit homo, quòd morte plectendus eſt, et adjudicatus morti appenſus fuerit in patibulo, non permanebit ejus cadaver in ligno, ſed in eadem die ſepelietur. And the reaſon that divines yeeld hereof is, for that by the execution of the judgement by death, the law is ſatisfied, and abhorreth cruelty, and in that caſe, *mors dicitur ultimum ſupplicium.*

And herein this is obſervable, that in treaſon and felony, the judgement

ment is only of the fatall and corporall puniſhment, and nothing of the forfeiture, which is implied, but in common pleas the judgements are more particular.

Judgement in Appeal, when the Defendant joyning Battail is vanquiſhed in the Field, &c.

If the defendant in appeal be vanquiſhed in the field, the record reciteth the vanquiſhing in the field. *Ideo conſideratum eſt, quod ſuſ. per col.* and ſo it is when the defendant is vanquiſhed and ſlain in the field, yet the judgement is *ut ſupra.* Otherwiſe there ſhould be no eſcheat: ſee the ſecond part of the Inſtitutes, W. 1. ca. 14. 8 E. 3. Judgement, 225.

Judgement in Treaſon or Felony, wherein neither any corporall Puniſhment or Forfeiture is expreſſed.

In caſe of treaſon or felony, if any perſon be outlawed, the judgement upon the exigent at the fift county court upon default of the party is, *Ideo, &c. per judicium coronatoris domini regis comitatus prædict, utlagatus eſt.* Which writ being duly returned of record by the ſherif, the party ſhall have the like corporall puniſhment, and ſhall loſe and forfeit as much as if he had appeared, &c. and judgement had been given againſt him in caſe of treaſon or felony reſpectively. And note that in theſe words *(ideo utlagatur)* both the corporall puniſhments and forfeiture alſo are implied: and if the proceeding therein, or the judgement be erroneous, and upon his appearance upon the *capias utlagatum,* if it appear to the court (whereof any man, as *amicus curiæ,* may inform the court) that the party may either avoid the outlawry againſt him by writ of error, or by plea, the court ought not to award execution againſt the party, but aſſign him or her councell learned, and require him or her by their advice, either to bring a writ of error or plead: but if the party refuſe to bring his writ of error or plead after convenient time be given, if the utlawry be erroneous and not void, the court may award execution. And ſo it was reſolved, *termino Hil. anno 3 Jacobi regis,* by the whole court in the kings bench, and divers preſidents thereof ſhewed in the reigns of H. 6. E. 4. and one in the reign of queen Eliz. which we ſaw; for as long as the attainder by outlawry ſtandeth in force, the party outlawed cannot be drawn in queſtion by any new indictment or appeal for the treaſon, or felony, for the which he was outlawed: for *auterfoitz attaint* for the ſame offence is a good plea to free him from anſwer in that cauſe, albeit the record be erroneous. But if the attainder or outlawry be void againſt him, then may he be either arraigned upon the former indictment, or appeal, or newly indicted, &c. if there be cauſe. And therefore the judges are to take due conſideration of the whole record of the attainder or outlawry, that they may be truly informed of the true ſtate of the cauſe, before they award execution of death againſt him upon the outlawry. Read Bracton, lib. 3. tract. 2. cap. 14. and Britton, cap. 13. fo. 20, 21. excellently treating hereof, and Fleta, lib. 1. cap. 27.

And by the common law *auterfoitz attaint, &c.* of the ſame felony was a good plea as well in an indictment as in appeal by the common

Regiſt. 164. b. Fecit feloniam pro qua utlagatus fuit.

Ry. H. 6. 2. a. Error Fi. 26. 28 E. 3. 91. a. 6 H. 4. 6. 9 H. 7. 19. b.

Hil. 3. Ja. coram rege per curiam.

Auterfoits attaint de meſme le offence.

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Vide 6 E. 3. 55. *in* Aiel. 12 E. 2. Eſch. 14. 19 E. 2. Cor. 387.

Bract. li. 3. f. 131. Britton. fo. 20, 21. Fleta li. 1. ca. 27.

mon law. See the ſtatute of 3 H. 7. cap. 1. concerning appeal of death: ſo as in an appeal of death, at the ſuit of the party, *auter foitz attaint de meſme le mort*, is no plea at this day, but in caſe of an indictment of death at the ſuit of the king, *auterfoitz attaint de meſme le mort* in appeal is a good plea. *Auterfoitz attaint de murder* is a good plea to an indictment, &c. of petit treaſon of the ſame death, for in effect it hath the ſame judgement, and the ſelf ſame forfeiture. So likewiſe if a man be attainted of manſlaughter, it is a good bar to an indictment of murder of the ſame death, *et è converſo.*

Auterfoitz attaint dun auter offence.
28 E. 3. 90. b.
Dier 4 Eliz. Stones caſe.
6 H. 4. 6.
10 H. 4. coron. 237. 6 E. 3. cor. 394. 22 E. 3. cor. 471. Stanf. f. 107, 108.
See 44 E. 3. 44.
7 H. 4. 31.
4 E. 4. 11.
* 1 H. 6. fo. 5.
Rot. Par. 3 R. 2. nu. 18. Jo. Imperials caſe.

By the common law if a man were attainted of a felony done by him, and admitting he were after pardoned, he cannot at the ſuit of the king be impeached for any felony whatſoever before his ſaid attainder by him committed, for by the attainder he was *mort in ley;* and in that caſe he had the judgement due for felony, viz. *ſuſ. per col.* But the party may have his appeal of robbery, for a robbery done before the felony, whereof he was attainted, becauſe in the appeal he is to have reſtitution of his goods, beſides judgment of death. * And if the party attainted of felony had committed high treaſon before his attainder, he ſhall anſwer to the treaſon notwithſtanding his attainder of felony, becauſe the king by the treaſon was intitled to have the forfeiture of all his lands, of whomſoever they were holden. Alſo for high treaſon there is another judgement being an offence of an higher nature: but being attainted of felony, if he commit treaſon afterwards, he ſhall anſwer thereunto, becauſe it is of higher nature then the felony, but it ſhall not deveſt the right of eſcheat, which lawfully was by the felony veſted in the lords, contrary to the opinion of juſtice Stanford in that caſe, for the act and offence of the party ſhall not deveſt the lawfull eſcheat of the lords: but if a man be attainted of treaſon, he cannot be after attainted of a former treaſon, *cauſa qua ſupra.*

Where a little before it is ſaid, that a felon by his attainder is *mort in ley*, it is to be underſtood of ſuch former offences as require *pœnam mortis:* for notwithſtanding the attainder, his body remains ſubject to arreſts and execution for debts, &c. *Vide hic paulo poſt*, Truſſels and Preſtals caſe *in margine.* Albeit for felony a man be adjudged to his penance, *pain fort et jure*, yet he may be impeached for any former felony, becauſe, the judgement is not given for the felony, but for his contumacy.

Dier 14 El. 308. Cobhams caſe.

If a man be attainted of petit larceny; he may be after attainted of a felony, for the which he ſhall have judgement of death, becauſe it is an higher offence, and is to have an other judgement.

Auterfoitz acquite, and the Judgement thereupon.

See Stanf. 105. a. & b. &c.

But *auterfoitz acquite*, muſt be of the ſame felony, and albeit he be acquit of the latter felony, yet may he be arraigned of any former felony: and ſo it is in caſe of treaſon, *auterfoitz acquite* of treaſon muſt be of the ſame treaſon, for it acquiteth no other, becauſe he ever remained a perſon able.

3 H. 7. ca. 1.
35 E. 3. tit. Coron. 116.
15 Aſſ. p. 7.

And albeit at this day in an appeal of death, *auterfoitz acquite*, upon an indictment of the ſame death is no bar, yet in an indict-

ment of death, *auterfoitz attaint de meſme le mort* in an appeal is a good bar.

In an indictment or appeal of death, if it be found that he killed him in his * own defence, he is acquited of the felony for ever.

It appeareth in Vauxes caſe, that if a man be erroneouſly acquited of felony by verdict and judgement thereupon given, yet if the indictment, &c. be inſufficient, he may be indicted againe for the reaſons and cauſes in that caſe reported, which you may reade there at large, and need not here be repeated: and thereunto this we wil adde, that the reaſon, wherefore upon an erroneous judgement of condemnation, the party as hath been ſaid) is driven to his writ of error; and in the caſe of an erroneous judgement of acquitall, that no writ of error needeth to be brought by the king, but the offendor may be newly indicted, &c. is this, that in the caſe of condemnation the judgement is, *Quod ſuſpendatur, &c.* which is the judgement of law due for the offence, and ought to be given therefore, and can have no other intendment: but in the caſe of acquitall the judgement is, *Quod eat ſine die, &c.* which may be given as well for the inſufficiency of the indictment, as for the parties innocency, or not guiltineſſe of the offence. And the judges of the cauſe ought before judgement to look into the whole record, and upon due conſideration thereof to cauſe it to be entred, *Ideo conſideratum eſt quod eat ſine die*; which upon that report, and this addition implied therein, we hold may ſatisfie the ſtudious reader.

Lib. 4. fo. 44. 45.

And ſo it was adjudged Mich. 33 & 34 Eliz. coram rege, in an appeale of death between Katherine Wrote and Tho. Wigges. Vid. 19 E. 3. Barre 444.

Vi. 3 H. 4. fo. 3. 11.

Auter foitz convict de meſme le Felony devant Judgement.

For this diviſion ſee Holcrofts caſe before in the chapter of Murder, and Lib. 4. fo. 45, 46. where the ſtatute of 3 H. 7. cap. 1. is well expounded: and the ſecond part of the Inſtitutes artic. ſuper Cart. cap. 3. & Lib. Intr. Co. fo. 53, 54, &c. and Lib. 4. fo. 40. Wetherels caſe. And Stanford, Lib. 2. cap. 37. in pl. coron.

Lib. 4. fo. 45, 46. Holcrofts caſe. Second part of the Inſtitutes, art. ſuper cart. cap. 3. Lib. Intr. Co. 53, 54, &c. Lib. fo. 40. Wetherels caſe. Stanf. lib. 2. ca. 37.

* Before the ſtatutes of 8 Eliz. cap. 4. and 18 Eliz. ca. 6. If a man had committed divers felonies, if he had been indicted of the laſt, and had benefit of his clergy, he could not have been impeached for any of the former felonies, albeit for the ſame he could not have had his clergy: by that act it is provided, that notwithſtanding the allowance of ſuch clergy, he may be impeached for any former offence, for which he could not have had his clergy.

* *Auter foits convict. dun auter felony.* 25 E. 3. cap. 5. pro Clero.

Judgement to reverſe an Outlawry for Treaſon or Felony.

The judgement to reverſe an outlawry of A. B. in caſe of treaſon or felony in a writ of error is: *Ideo conſideratum eſt quod utlagaria prædicta ob errorem prædict' et alios in recordo et proceſs' prædict. compert', revocetur, adnulletur, et penitus pro nullo habeatur, et quod prædict. A. B. ad communem legem, et omnia quæ occaſione utlagariæ prædict. amiſit, reſtituatur, &c. et quod ipſe eat ſine die.*

Vid. Paſc. 39 E. 3. rot. 95. Scire fac. Dominis mediatis & immediatis

If the outlawrie be avoided by plea, then the judgement is, *Ideo conſi-*

conſideratum eſt quod prædictus A. B. de utlagaria prædicta exoneretur, et quod ipſe ad communem legem, et omnia, quæ occaſione utlagariæ prædict. amiſit, reſtituatur, et ea occaſione non moleſtetur in aliquo, nec gravetur, ſed ſit, et eat inde quietus.

If A. B. be indicted of treaſon or felony in the kings bench, or if he be indicted before commiſſioners of oier and terminer, or any other, and the indictment of treaſon or felony is removed into the kings bench: and by proces out of the kings bench he is erroneouſly outlawed and ſo returned, a writ of error may be brought in the kings bench for reverſall thereof.

Stanf. pl. cor. 18. k. l.

And where it is holden by ſome, that if any perſon be attainted of high treaſon by the common law, that no writ of error ſhould be brought for the reverſall of that attainder by reaſon of theſe words of the ſtatute of 33 H. 8. cap. 20. viz. And if any perſon or perſons ſhall be attainted of high treaſon by the courſe of the common law, &c. that every ſuch attainder by the common law ſhall be of as good ſtrength, value, force, and effect, as if it had been done by authority of parliament. But the contrary hereof was reſolved at a parliament holden *anno* 28 Eliz. that a writ of error ſhould be maintained for the reverſall of erroneous attainders of high treaſon by the common law: for that ſtatute of 33 † H. 8. is to be intended of lawfull attainders by the due courſe of the common law, and not of erroneous or void attainders. And thereupon at that parliament holden *anno* 28 Eliz. an act was made, That no record of attainder of any perſon or perſons, of or for any high treaſon, where the party ſo attainted ‡ is or hath been executed for the ſame treaſon, ſhall be, &c. in any wiſe hereafter reverſed, undone, avoided, or impeached by any plea, or for any error whatſoever.

33 H. 8. cap. 20.

‡ Nota, this act extends only to attainders of treaſons before the act of 28 El. where the party hath been executed, and not to attainders of treaſons afterwards.

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* And albeit judgement be given againſt a man in caſe of treaſon or felony, yet his body is not forfeited to the king, but untill execution remains his own. And therefore before execution, [a] if he be ſlain without authority of law, his wife ſhall have an appeal; for notwithſtanding the attainder he remained her huſband. And after ſuch attainder his body may at the ſuit of a ſubject be taken in execution upon a judgement or ſtatute, &c. And he may be executed for treaſon or felony, notwithſtanding ſuch execution had againſt him. And in an action of debt, or other action brought againſt a perſon attainted, he cannot plead the attainder, and demand judgement, if during the attainder he ſhall be put to anſwer: [b] for upon conſideration had of the books in 11 Aſſ. 27. 2 E. 4. 1. 4 E. 4. 8. 6 E. 4. 4. 6 H. 4. 6. 8 Eliz. Dier 245, &c. [c] it was adjudged that the perſon attainted ſhould not plead the ſaid plea, but ſhould be put to anſwer. And there is a great diverſity between an attainder of treaſon or felony, and an entry into religion; for he that is attainted of treaſon or felony hath capacity, and [d] may purchaſe lands to him and his heirs, [e] but ſo cannot he that is entred into religion. And it is againſt a rule in law, that any man of full age ſhould be received in any plea by the [f] law to diſable his own perſon, [g] or take advantage of his own wrong. And if the perſon attainted be beaten or maimed, or a woman attainted be raviſhed, after pardon, they ſhall have an action of battery, appeale of mayme, or rape. See Lib. Intr. fo. 247, 248.

* What intereſt the king hath in the body of the attainted before execution.

[a] 35 H. 6. 63.

[b] See Britton, ca. 122. Flet. lib. 6. cap. 6. 7.

[c] Mich. 38 & 39 Eliz. in communi banco int. Baniſter and Truſſel attaint de felony. Vide Mich. 33 & 34 Eliz. coram Rege rot. 532. int. Ognel and Truſſel. Mich. 32 Eliz. inter Wade plaintife, and Preſtal defendant attaint de haut treaſon, coram rege. Vid. ſup.

[d] See the firſt part of the Inſtitutes, ſect. 1. §. Car. ſi home purchaſe.

[e] Ibid. ſect. 199. 200. mort in ley

[f] Firſt part Inſt. ſect. 405.

[g] 45 E. 3. 5. a. 18 E. 4. 25. 15 E. 4. 5. a. &c. Lit.

In

[h] In antient time a man indicted or appealed of life or member, or impriſoned, &c. ſhould not be compelled to anſwer at other mens ſuits, but (as before it appeareth) theſe opinions have been juſtly changed.

[h] Brit. ca. 122. a. § Encuſement de crime. Fleta, lib. 6. c. 6, 7. &c.

[i] There was a notable caſe adjudged in the kings bench Mic. 26 & 27 Eliz. wherewith I was well acquainted concerning the matters of outlawry and errors before ſpoken of, which was in effect as followeth.

[i] Mic. 26 & 27 El. Ninian Melvins caſe in the kings bench in bre. de errore.

Ninianus Menvile nuper de Stedwich in com' Dunelm. ar' anno 1 & 2 Ph. and Mar. was indicted in the kings bench of high treaſon, and upon proces he was outlawed, and ſo retorned, and his daughter and heire brought a writ of error in the kings bench, wherein two errors were aſſigned. 1. That before the exigent the 2 capias with a proclamation was awarded to the ſheriffe of the county palatine of Durham, where it ought to have been directed to the chancellour of that county. [k] For that point 30 H. 6. 6. 36 H. 6. 35. 1 E. 4. 10. the book of entries Raſt. fo. 52. Stanf. pl. cor. 68, 69. & 70. Vid. 19 H. 6. 2. 31 H. 6. 11. but the court gave no opinion concerning this error. The other error that was aſſigned, was that the ſheriffe retorned upon the ſaid capias, that at his court holden at the city of Durham the eight day of July in the ſecond and third yeares of the reigne of king Philip and queen Mary he made the proclamation, &c. and there were no ſuch years: for queen Mary began her reigne the 6 day of July, and the 25 day of July in the 2 year of her reign ſhe maried king Philip: ſo as between the 2 day of July, and the 25 day of July, the queen wrote two years before the king. And therefore there could be no ſuch years as 8 July *anno* 2 & 3, but ſhould have been 2 & 4. And ſo was the clear opinion of the whole court. But then it was objected, that by the ſaid act of 35 H. 8. and Stanfords opinion thereupon, that the attainder by outlawry being an attainder by the common law, it could not be reverſed by writ of error, for that the ſaid act of 35 H. 8. was to be intended of lawfull attainders: and after great deliberation the outlawry of treaſon was reverſed. And I take it, it ſhall not be altogether impertinent, ſure I am it ſhall not be unprofitable, to report the conſequent of this reverſall. In the next terme, ſc. term. Hil. *anno* 27 Eliz. for that queen Eliz. had the lands whereof the ſaid Ninian was ſeiſed in fee: his wife by petition of right, which comprehended the title of the wife, and the title of the queen, claimed her dower, which in effect was this: that her huſband was ſeiſed of certain lands in fee, and took her to wife; and before his treaſon committed *anno* 1 *Mariæ* levied a fine with proclamation to another, whoſe eſtate the queen had by lawfull conveyance therein expreſſed; and that afterward her ſaid huſband was attainted of high treaſon by outlawry, *ut ſupra*, and died in *anno* 4 Eliz. which outlawry was the laſt terme reverſed in a writ of error, as is aboveſaid: which petition being indorſed by the queen, *Soit droit fait al partie*, and delivered into the chancery, Sir Thomas Bromley a man of great gravity and judgement in law, then being lord chancellor of England, by advice of all the judges reſolved theſe four points following. Firſt, that the petitioner need not to have any office to finde her title, becauſe her title ſtandeth with the title of the queen, and the queen is not intitled by office (which ſhe might

[k] See the ſtat. of 8 H. 6. cap. 10.

Hil. 27 Eliz. in filaciis cancellariæ.

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traverſe,

traverſe, or confeſſe and avoid) but by conveyance, which ſhe affirmeth. Secondly, that a fine with proclamations, and five years paſt after the death of the huſband doth bar the wife of her dower, and that the conuſee ſhall take advantage thereof, and of the attainder alſo. Thirdly, that albeit five years and many more in this caſe were paſt ſince the death of her huſband, yet the ſaid fine with proclamations did not bar her; becauſe as long as the ſaid attainder of treaſon ſtood in force, ſhe was barred of her dower, and could not have any remedy, or purſue her title, untill the outlawry were reverſed, and then her title of dower did firſt grow due unto her, and therefore ſhe might within five years after the reverſall of the ſaid outlawry, purſue her title by the expreſſe words of the ſaving of the act of 4 H. 7. Fourthly, albeit an attainder reverſed by a writ of error, is as concerning reſtitution to the party by relation from the beginning become of no force, [a] and the record ſo annihilated thereby, as *nul tiel record* may be pleaded thereunto: yet this relation ſhall never work a bar, and conſequently a wrong to a ſtranger, but that the truth of the matter may be ſhewed, viz. the record, and the reverſall of the ſame: and the rather (as ſome ſaid) becauſe the wife could not have any writ of error to reverſe the outlawry, [b] ſo as ſhe had no mean to purſue her right ſo long as the outlawry remained in force, which it did, untill it was reverſed by error. But admit the wife had been (in a remote degree of conſanguinity) heir to her huſband, ſo as ſhe might within five years after the death of her huſband have had her writ of error after the death of her huſband to reverſe the outlawry, and to enable herſelfe to purſue for her dower, and reverſeth not the outlawry within the five years: I hold in this caſe that ſhe ſhall have five years after this reverſall, and that within the ſaid ſaving of the ſtatute of 4 H. 7. for then did her title of dower (as hath been ſaid) firſt grow unto her, * and it was not in her power to reverſe the outlawry when ſhe would. And in this term of S. Hillary, Popham attorny generall, according to the ſaid reſolution of the lord chancellor and judges, confeſſed the petition to be true; and thereupon judgement was given, that ſhe ſhould be indowed, and was indowed accordingly.

Vide Lib. 2. fo. 93. Bingbams. caſe. See the firſt part of the Inſtitutes. ſect. 55.

4 H. 7. cap. 24. the firſt ſaving.

[a] 26 E. 3. 75. 4 H. 7. fo. 22. & 11, 12. 38 H. 6. 4 & 12. 21 E. 4. 23. Dier 29 H. 8. fo. 32. pl. 8. idem. 6 Eliz. 228. pl. 45. 3 Eliz. fo. 188. pl. 8. a. Lib. 8. fo. 42. 43. b. Dr. Druryes caſe.

[b] 34 H. 6. fo. 2.

* Nota.

[c] By the ſtatute of 26 H. 8. and 5 E. 6. it is enacted, that all proces of outlawry againſt any offenders in treaſon, being out of the realm, or beyond the ſeas, at the time of the outlawry pronounced, ſhall be as good and effectuall as if the offenders had been within the realme at the time of the outlawry pronounced. See the ſaid ſtatute of 5 E. 6. cap. 11. that, if the party outlawed ſhall within one year after the outlawry pronounced, yeild himſelfe to the chief juſtice in England, and traverſe the ſaid indictment, &c. and thereupon be found not guilty by verdict, he ſhall be cleerly diſcharged of the ſaid outlawry.

[c] 26 H. 8. cap. 13. 5 E. 6. cap. 11. Theſe ſtatutes not only extend to all treaſons by the ſtatute of 25 E. 3. by the common law, but by any other ſtatute. Vi. Dier 12 Eliz. fo. 287. accord. Firſt part of Inſtitutes, ſect. 479.

Judgement in caſe of Abjuration for Felony, whiles it was of Force.

After the flying of a felon for any kinde of felony whatſoever, ſacriledge excepted, (but in caſe of high treaſon or petit treaſon a man could never abjure, becauſe the coroner is not allowed by law

law to be a judge of thoſe heynous crimes) into a church, &c. for ſafegard of his life: and upon his prayer of a coroner [a], * and his voluntary and particular confeſſion of the felony before the coroner, naming the certain time, the judgement was, *Idem A. petiit de præfato coronatore regnum dom. regis Angliæ abjurare: ſuper quo tradito* [b] *ei libro p. præfat' coronatorē, idem A. regnum prædict. cora' præfato coronatore prædict' die, &c. in eccleſia prædicta abjuravit, in idem regnum nunquam rediturus abſque ſpeciali licentia, et reconciliatione regis Angliæ, et aſſignatus eſt eidem A. pro tranſitu ſuo extra regnum prædictum portus de Yarmouth* [c] *cruce in manu ſua dextra poſita, prout lex Angliæ eſt et conſuetudo.* Nothing is expreſſed in this judgement but *abjuravit regnum*, but therein is implied, that all his lands, which he had at the time of the felony committed, [d] (and therefore the time of the felony was ſet down in his confeſſion particularly) or at any time after, eſcheated to the lords of the fees, and forfeited to the king all his goods which he had at the time of his attainder, [e] the time whereof alſo was expreſſed certainly, and his blood corrupted, and other incidents, as in other attainders of felony, only by his voluntary and particular confeſſion. In this caſe for the offence of felony, he ſaved his life ſo long as he kept himſelf *extra regnum*, but if he returned, then under this word [*abjuravit*] is implied *ſuſ. per collum.* Mich. 1 R. 2. rot. 1. Bedf. *rediit et ſuſpend.* See the firſt part of the Inſtitutes, ſect. 200. fo. 132, 133. and the ſecond part of the Inſtitutes, W. 1. ca. 20. verbo, [f] *Fore jure le realm.*] artic. Cler. cap. 10. and 15. And the law was ſo favourable for the preſervation of ſanctuary, that if the felon had been in priſon for the felony, and before attainder or conviction, [g] had eſcaped and taken ſanctuary in church or church-yard, &c. and the gaolers or others had purſued him, and brought him again to priſon, upon his arraignment he might have pleaded the ſame, and ſhould have been reſtored again to the ſanctuary: ſee more concerning abjuration, Mic. 9 E. 3, coram rege rot. 84. *extra legem poſitus, &c.* To conclude this judgment of abjuration, we take it, that for felony [h] abjuration is utterly taken away. For abjuration of recuſants and of hunters in parks, &c. we have given but a light touch, becauſe they belong not to our treatiſe of the pleas of the crown, nor have we ſpoken any thing of abjuration in caſe of hereſy, *quia ſpectat ad aliud forum.*

Thus have we ſpoken of judgments, and attainders in caſes of high treaſon, upon verdict, confeſſion, or *nihil dicit*, and by outlawry: in caſe of petit treaſon, upon verdict, confeſſion, or by outlawry: and in caſe of felony, upon verdict, or confeſſion, or by outlawry, or by abjuration; for none can be attainted of petit treaſon or felony upon a *nihil dicit*, or refuſal to anſwer, but in that caſe the delinquent is to have his puniſhment of *peine fort et dure*, which next falleth to be handled.

[a] 6 E. 3. 53. in Ajell Malloms caſe. 12 E. 2. eſche. 14. Tr. 21 E. 1. coram rege 42. ſimile.

[b] Hereupon it was called abjuration, becauſe he was ſworn to depart the kingdome. See the Oath Vet. Mag. Cart. 1. pte. f. 167. 168.

[c] That he might be known to be an abjured perſon, and not be let, or hindred in his journey. Et crux fuit ſignum ſervatæ vitæ per eccleſiam, and is ſometimes called vexillum ſanctæ eccleſiæ. Hil. 26. E. 3. coram rege rot. 20.

[d] Pl. com. f. 262. a. in Dame Hales caſe. Regiſter, fo. 164. b. & de felohiam pro qua regnum noſtrum abjuravit.

[e] Stanf. pl. cor. 117. E. 6 E. 3. 55. in Ajell Malloms caſe. 12 E. 2. Eſch. 14. 6 E. 2. Forf. Br. 121. 6 H. 4. 6.

[f] Forejure in French is taken for abjure, in Latin abjurare. 1 E. 3. 17. lib. intr. Raſt. fo. 246. b. pl. 6.

[g] Lib. int. Raſt. 532. b. ſanct. 2. Hil. 43 E. 3. rot. 115. Buck. William Attewels caſe.

[h] For all ſanctuaries are taken away by 21 Jac. ca. 28. Note a ſanctuary in the ſtatute of 1 H. 7. cap. is called a hidel or hydle, becauſe it hideth and protecteth the party, &c. Vide Deut. cap. 19. 3. 9, 10. Numb. 35. 13. Joſhua 20. 8. See 2. part of the Inſtitutes, Gloc. ca.

Peyne fort et dure.

[1] First part of the Inſtit. ſect. 545. verb. attaint. 2 part of the *Inſtit.* W. 1. c. 12. Dier 3 El. 205. a. 13 El. 300. b. See before in the chap. of Treaſon. See after in the next chapter of Forfeiture fo. when the party arraigned challengeth peremptorily above the number of 36. viz. three whole juries.

[k] 35 H. 6. 57. 58. Vide li. 9. fo. 124. the lord Zanchers caſe.

In caſe of petit treaſon or felony, [1] when the offender ſtandeth mute, and refuſeth to be tried by the common law of the land; See *Paine fort et dure* in the ſecond part of the Inſtitutes, W. 1. ca. 2. but this holdeth but in caſe of petit treaſon and felony. In caſe of high treaſon, upon ſtanding mute, or a *nihil dicit*, the judgement aforeſaid ſhall be given againſt him, as if he had been convicted.

And in doing of execution, both in treaſon and felony, two things are to be obſerved. Firſt, that it be done by the right officer, as the ſherif, or marſhall, for if any other execute the offender, it is felony. Secondly, execution muſt be made by him that is the right officer according to the judgement: for example, [k] where the judgement is, that the offender ſhall be hanged, he cannot behead him, &c. as before is ſaid. Bracton, lib. 3. fo. 104. b. *Non alio modo puniatur quis, quam ſe habeat condemnatio.* P. 20 R. 2. coram rege rot. 58. Lincoln. *Non licet felonem pro felonia decollari.*

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Judgement in caſe of Petit Larceny.

Bracton. lib. 3. fo. 151. b. Britton. fo. 24. a. Fleta, li. 1. ca. 36. Bracton, lib. 3. fo. 104. b. maketh mention of puniſhment, verberibus et virgis.

The judgement herein was in ancient time referred to the diſcretion of the judge, as in Bractons time, *Per fuſtigationem, et ſic caſtigatus dimittitur.* In Brittons time, ſometime by the pillory, ſometime by the loſſe of the ear: and Fleta ſaith, *Eſt enim furtum de re magna et parva, pro minimo tamen latrocinio 12 denariorum et infra, nullus morti condemnetur; pro hujuſmodi modicis delictis inventa fuerunt judicialia pilloria, et deformitates corporum, ut ſciſſio auricularum.*

* 18 Aſſ. p. 13. 8 E. Cor. 130. 41 E. 3. Cor. 451.

* But in and ſince the reign of E. 3. no perſon loſt any member for petit larceny, but were ſometime puniſhed by impriſonment, and ſometime by other penance, as whipping, &c. If the delinquent flyeth for petit larceny, and ſo be found by the jury, he forfeiteth his goods.

Judgement in caſe of Miſpriſion of High Treaſon.

That the offender by the common law ſhall for this concealment forfeit all his goods; and the profits of his lands during his life, and ſuffer impriſonment during his life. Vide Stanford pl. coron. fo. 38. 1 et 2 Mar. cap. 10.

Judgement for ſtriking in Weſtminſter Hall, &c. ſitting the Courts.

Tr. 4 E. 4. coram rege rot. 3. 15 E 3. Judgement. 174. 39 Aſſ. p. 1. 41 Aſſ. 25. 22 E. 3. 13. a. 41 E. 3. coron. 280. 42 Aſſ. 18. Stanf. pl. cor. 38. c. 3 Eliz. Dier 188.

That the offender ſhall be impriſoned during his life, forfeit all his lands, tenements, goods and chattels, *et quod manus ſua dextra amputaretur (apud talem locum)* and this judgement is given by the common law. Bracton, lib. 3. 104. b. *Pœnarum quædam adimunt membrum, et corporis coercionem, ſc. impriſonamentum, vel ad tempus, vel imperpetuum.*

Judgement

Judgement for ſtriking and drawing Blood in the Kings Court, &c.

The offender ſhall have his right hand ſtricken off, be impriſoned during his life, and be fined and ranſomed at the kings will: and this judgement is given by the ſtatute of 33 H. 8. cap. 12. 33 H. 8. Paine Br. 16.

We cannot omit to touch by the way an act made in 1 & 2 Ph. and Mar. intitled, an act againſt ſeditious words and rumours, by a branch of which act, he that ſhould ſend forth any booke, ryme, ballad, letter or writing containing any falſe, matter, clauſe or ſentence of ſlander or reproach, and diſhonour of the king and queens majeſty, or either of them, &c. ſhould have his or their right hand ſtricken off; which act being but a probationer, at the parliament in 4 & 5 Ph. and Mar. was continued untill the end of the next parliament. And by the act of 1 Eliz. (which was the next parliament) the ſaid act of 1 & 2 Ph. and Mar. was enacted to extend to queen Elizabeth, and to the heirs of her body kings and queens of this realm, ſo as by the demiſe of queen Eliz. that act hath loſt his force, as it was well worthy, being a dangerous act as ſome had felt in anno 23 Eliz.

1 & 2 Ph. and Ma. ca. 3. obtruncatio manus dextræ.

1 El. c. 6.

Judgement in a Premunire at the Suit of the King.

If the defendant be in priſon, *Quod prædictus R. ſit extra protectionem domini regis, et terras, et tenementa, bona et catalla domino regi forisfaciat, et quod corpus ejus remaneat in priſona ad voluntatem regis,* as in the book of entries, Raſt. Judgement 465. And this judgement is given by the ſtatutes of 25 E. 3. ca. 22. 25 E. 3. de Proviſoribus. 27 E. 3. ca. 1. 16 R. 2. ca. 5. and if he be not in priſon, *Quod præd. R. ſit extra protectionem domini regis, et terras et tenementa, bona et catalla domino regi forisfaciat, et quod capiatur.*

See the 1. pt. of the Inſtit. §. 159.

44 E. 3. 36.

Judgement in caſe of Theftbote.

That the offender be fined: and it is to be obſerved that whenſoever the delinquent, or defendant is to be fined, the judgement is *quod capiatur*, that is, to be impriſoned untill he doth pay his fine: but when the defendant is to be amerced, and not fined, then the defendant is *in miſericordia*, whereof you may read at large. Lib. 8. fo. 38, 39. &c. et 59, 60. et 120. lib. 11. 43, 44.

5 E. 3 Cor. 353. 29 E. 3. 9. 27 Aſſ. 69. 42 Aſſ. pl. 5. Stanf. fo. 40. b.

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Pillory.

Pillory is a French word, and it is derived of the French word *pilaſtre* a pillar, *columna*. *Et eſt lignea columna, in qua collum inſertum premitur*, and thereupon in law it is called *colliſtrigium, quia in eo collum hominum conſtringitur*: this puniſhment is very ancient, for the Saxons called it *heals fang*, ſo called for ſtraining the neck. Britton, fo. 24. ſaith, that thoſe that have been adjudged to the pillory, or tumbrell, are ſo infamous, *Come ilz ne ſont receivz*

Saxonicè *healsfang*. Or *halſfang*, *hals* collum, *fang* preſſio. It is alſo called an amerciament for commutation of ſuch a puniſhment. 51 H. 3. Judicium colliſtrigii. Et pillorii,

Vet. N. B. 1. parte. 116, 117. Britton, fo. 24. Mirror, cap. 4. §. De paines en divers manners.

receivables al ſerement faire in juries, enqueſts ou en teſtmoignants; and herewith agreeth Bracton. Vet. Mag. Cart. 2. parte, fo. 23, 24. 45.

Kelway temps E. 3. 145. b. Fleta, li. 2. cap. 8. By the ſtatute of 51 H. 3. & 31 E. 1. Vet. Mag. Cart. 2. parte, fo. 23, 24. 45.

Bracton, lib. 3. fo. 104. b. 129. b. 151. b. 138. Mirror ubi ſupra. Temps E. 3. Kelway 139, 140. b. 149. b. 152. Fleta li. 2. ca. 11. §. Item ſi d'nus li. Intr. Raſt. 494. a. in Quo warr. 7 E. 2. in eodem 260. b.

Tumbrell.

Tumbrell is a word in uſe at this day for a dungcart. Bracton calleth it *tymboralem.*

Infligitur pœna corporalis, ſc. pilloralis vel tumberalis cum infamia. Secundum regni ſtatuta, it is called tumberellum, there being no proper Latin word for a dungcart.

Furce pillor et tumbrel append al view de franckpledge And every one that hath a leet or market ought to have a pillory and tumbrell, &c. to puniſh offenders, as brewers, bakers, foreſtallers, &c.

Trebuchet.

Stat. de 51 H. 3. ubi ſupra. Vet. Mag. Cart. part 2. fol. 44, 45. ſtat. de pane & ceviſia.

Or caſtigatory, named in the ſtatute of 51 H. 3. ſignifieth a cucking ſtool, and trebuchet properly is a pitfall or downfall, and in law ſignifieth a ſtool, that falleth down into a pit of water, for the puniſhment of the party in it. And *cuck*, or *guck* in the Saxon tongue, ſignifieth to ſcould or brawl, (taken from the cuckhaw, or guckhaw, a bird, *qui odioſe jurgat et rixatur*) and *inge* in that language [water] becauſe ſhe was for her puniſhment ſowſed in the water, and others fetch it from cuckquean, i. *pellex.*

Judgements to be given by juſtices of aſſiſe, of oier and terminer, of gaol-delivery, of juſtices of peace.

Now for that the judgement to the pillory or tumbrell (as it hath appeared before) doth make the delinquent infamous, and that the rule of law is, *Judicium de majore pœna quam quod legibus ſtatutum eſt non infamum facit, ſed per breve de errore adaullare poteſt*, and again, *pœna gravior ultra legem poſita æſtimationem conſervat*, that the juſtices of aſſiſe, oier and terminer, gaol-delivery, and juſtices of peace, would be well adviſed before they give judgment of any perſon to the pillory or tumbrell, unleſſe they have good warrant for their judgment therein. Fine and impriſonment for offences finable by the juſtices aboveſaid, is a fair and ſure way.

* Vet. Mag. Cart. parte 2. fo. 24, 25.

And it is to be obſerved that thoſe kinds of puniſhments of pillory, &c. have been given by acts of parliament in caſes of enormous and exorbitant offences, as by the ſtatutes of 51 H. 3. 31 E. 1. De piſtoribus, &c. 31 E. 1. De foreſtallariis. 11 H. 7. ca. 4. 33 H. 8. ca. 1. 1 & 2 Ph. and Mar. cap. 10. 2 E. 6. ca. 15. 5 E. 6. ca. 6. & 14. 7 E. 6. ca. 7. 1 El. c. 7. 5 El. ca. 9. 16. 18 El. cap. And therefore the ſafeſt way for them is to follow thoſe acts of parliament in caſes provided by the ſame: but of the court of the kings bench, (the higheſt court of ordinary juſtice) in reſpect of the multitude of the judicial preſidents (which we have ſeen) we ſay with the poet. *Huic nec metas rerum, nec tempora pone*, (for judiciall preſidents of grave and reverend judges, are good

good guides to direct men in the right way) we will enumerate some of them.

Exemplary punishments adjudged in the kings bench.

21 E. 1. coram reg. rot. 2. Eustachius de Porles Castel, for slandring of justice Berisford, imprisonment in the tower, *ad voluntatem regis.*

Mich. 33 E. 1. coram rege. Rot. 75. William Brewoes case, for slandering, &c. of Roger Hegham justice. Tr. 3 E. 2. int. mem. scaccarii for slandering of Foxley, a baron of the exchequer. Mich. 18 E. 3. coram rege, Rot. 151. for slandering of the justices of the kings bench, by a letter of Tho. Bulbroke a clerk of the same court. 30 Ass. p. 5. 19. 19 Ass. 1. Pasch. 10 E. 3. Rot. 87. *Thom. Twice Huzarder cois' ludens ad falsos talos adjudicatur quod per sex dies in diversis locis ponatur super collistrigium.* Mich. 10 E. 3. Rot. 92. coram rege, Adam de Ravensworth. Mich. 21 E. 3. coram rege, Warw. Vers. Attornat' apparent' sine warranto. Hil. 25 E. 3. coram rege, Rot. 13. *versus Robert. Hadham commissionarium pro venditione bladi in garbis adjudicatur prisonæ, et quod ab omni officio domini regis amoveatur et finem faciat.* Tr. 2. H. 4. coram rege, Rot. 10. Suss. Mich. 4 & 5 Eliz. coram rege, Hugh Bakers case, for a libell against certain of the inhabitants of Cherse, punished by imprisonment, pillory, and good behaviour, &c.

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Ancient rules of law in corporall punishments.

See the fourth part of the Institutes, cap. Star-Chamber, for punishment by pillory, &c. for enormious and exorbitant offences, which require more exemplary punishment then an ordinary course of the laws of the realm do inflict. *Nobiles magis plectuntur pecunia, plebei vero in corpore;* which is observable in all the said statutes. And Bracton saith, *Quælibet pœna corporalis, quamvis minima, major est qualibet pœna pecuniaria. Carcer ad continendos, non ad puniendos haberi debet, &c. Pœnæ potius molliendæ, quam exasperandæ sunt. Respiciendum est judicanti, ne quid aut durius, aut remissius constituatur, quam causa deposcit; nec enim aut severitatis, aut clementiæ gloria affectanda est. Aliter puniuntur ex eisdem factionibus servi, quam liberi: et aliter qui quidem aliquid in dominum, parentemve commiserit, quàm in extraneum; in magistratum, quam in privatum.*

Bracton, lib. 3. fo. 105. a.

Ibid.

Ibid.

Death of a man per infortunium.

Of this mischance there is no expresse judgement to be given, but the offender is to sue out his pardon of course, as it appeareth in the second part of the Institutes, Gloc. cap. 9. And hereof Bracton saith, *Casu, cum per infortunium, ut si aliquis venando per telum in feram missum, hominem interfecerit, et similia perpetraverit, &c.* But albeit there be no expresse judgement given upon such a verdict, yet the law giveth a judgement thereupon, viz. that he shall forfeit all his goods and chattels, debts and duties whatsoever, as in the second part of the Institutes, *ubi supra,* it appeareth.

Marlbr. cap. 26.

Bracton ubi sup.

Judgement implyed, or in law. 24 H. 8. cap. 5.

Of Death of a Man, se defendendo.

Upon such a verdict given the court giveth no expresse judgement, for he is also to be pardoned of course: but the law hath given a judgement, that he shall forfeit all his goods and chattels, debts and duties, as in the second part of the Institutes, *ubi supra,* it appeareth.

Judgement implyed, or in law. See ca. 7 fo. 95. b. 43. Ass. p. 31. Rot. pa l. 3 R. 2. nu. 18. John Imperials case.

appeareth. But the jury cannot finde that the party killed him generally *ſe defendendo:* but they ought to finde the caſe ſpecially, ſo as the court may judge whether in law it be *ſe defendendo*, or no. See Stanf. fol. 15.

Of the Death of a Man that offereth to rob, &c.

If it be found by verdict, that the party (indicted or appealed for the death of A) A attempted to have murdered or [a] robbed him in or nigh any common high way, cart-way, horſe-way, or foot-way, or in his [b] manſion or dwelling houſe; or for the killing of him which attempteth burglary to break his dwelling houſe in the night; the judgement upon ſuch a verdict ſhall be, that he ſhall be acquited of the death of ſuch a perſon paying his fees, and he ſhall forfeit nothing. And ſo it is [c] declared and enacted by the ſtatute of 24 H. 8.

And if all the circumſtances be proved to the jury in evidence required by this act in theſe caſes, the jury may finde a generall verdict of not guilty. And where it is rehearſed in the ſaid act of 24 H. 8. that before that act it was a queſtion and ambiguity whether evill diſpoſed perſons ſo attempting, *ut ſupra*, ſhould forfeit their goods and chattels: the reaſon of that queſtion and ambiguity was in none * of thoſe caſes mentioned in that act, no robbery, murder, or burglary was done, but an attempt only to do it. But it was no queſtion at the common law, that if a robbery, murder, burglary, or other felony was done, and purſuit made after the offender, who either by reſiſtance or flight could not be apprehended without killing of him by inevitable neceſſity, the party ſo purſuing and killing ſhould not forfeit his goods or chattels; for in thoſe caſes every man may arreſt the felon by a warrant in law. But there is a diverſity between a warrant in deed, and a warrant in law, in this, that if a man be indicted of murder, robbery, burglary, or other felony, and the ſheriffe by vertue of a *capias* offer to arreſt him, and he reſiſteth and flye, *ut ſupra*, the ſheriffe may kill him, if otherwiſe he cannot arreſt him, although in truth the party be not guilty, nor any felony done. But in the caſe of the abovesaid warrant in law, there muſt be a felony done, and this diverſity appeareth in our books. * And ſo it is, if after arreſt for felony the party arreſted reſiſteth or flyeth, and in purſuit is ſlaine by inevitable neceſſity, they ſo killing him forfeit nothing.

An approver that kils the party accuſed in battell, or a champion that killeth the other champion in a writ of right, or the plaintife or defendant in an appeale that killeth the other *in duello*, according to the common law, or in combat awarded by the [a] conſtable and marſhall in the court of chivalry, the party killing ſhall forfeit nothing; for theſe combats or duels are ſuch trials as the law appoints in ſuch caſes. For ſaith Fleta, *Duellum eſt ſingularis pugna inter duos ad probandum veritatem litis; et qui vicerit probaſſe intelligitur: et q amvis judicium Dei expectatur ibid. quicunque tamen monomachiam, i. ſingularem pugnam ſponte ſuſceperit, aut obtulerit, homicida eſt, et mortale contrahit peccatum.* But before we leave theſe champions, it is to be obſerved that whoſoever taketh upon him to be a champion for another (the forme and [b] oath whereof you may reade in the ſecond part of the Inſtitutes, W. 1. cap. 40. and Glanvil.

[a] 3 E. 3. cor. 305.

[b] 3 E. 3. cor. 330. 26 Aſſ. 23. Exod. 22. Si effringens vir domum ſive ſuffodiens fuerit inventus, & accepto vulnere mortuus fuerit, percuſſor non erit reus ſanguinis.

[c] Nota, declared, &c. and ſo was the common law, as by the books aforeſaid it appeareth. 22 Aſſ. p. 55. 22 E. 3. cor. 261. 2 E. 3. cor. 328. 3 E. 3. [illegible] 289, 290

* [221]

* See in the cha. of Hue and Cry.

[a] Rot. par. 3 H. 4. part. 2. Duellum percuſſum. 13 H. 4. 4. 37 H. 6. 20, 21. See before in the chapter of Approver. Fleta, lib. 1. ca. 32.

[b] 4 E. 3. 41. 30 E. 3. 20. 20 E. 3. 12. 13 Eliz. Dier, 301. Mirror, cap. 3. § Combat, & § Juramentum duelli, & § Ordinatio pugnantium.

Glanvil. lib. 2. cap. 3.) if he become recreant, that is, a crying coward or craven, he ſhall for his perjury [c] loſe *liberam legem*. [d] Craven is derived from the Greek word κραυγη, *à vociferatione*: others nearer home, of crying and craving of mercy and forgiveneſſe. And *recreantia* is derived of the French word *recreance*, of giving back or cowardize. And ſometime it is called *creantia* [e] *per antiphraſin*, becauſe he that uſeth it is not faithfull, but breaketh his oath. And ſo if the appellant joyne battell, and cry craven, he ſhall alſo loſe *liberam legem* for the cauſe aforeſaid, but if the appellee cry craven he ſhall be hanged: * but if they combat untill night come, and ſtarres appear, the defendant in the appeal goeth quit, and the plaintife in that caſe loſeth not *liberam legem*. [f] *Amittere liberam legem* is to become infamous and of no credit, never to be witneſſe, or juror: for when he is of fame and credit, he is called *liber et legalis homo*: and ſuch men ought to be of juries and witneſſes, becauſe they do enjoy *liberam legem*. [g] And a champion ought to be *liber homo*, and ſo is the entry, *per corpus liberi hominis. Et quam infamiam victus incurrit*, ſee Glanvile, lib. 2. cap. 3. & lib. 14. cap. 1. And he further ſaith, *Talis debet campio petentis eſſe, qui ſit, et eſſe poſſit inde teſtis idoneus*. So as no man by the ancient common law could be a champion, but he that knew the right, and was a witneſſe thereof: and therewith agreeth the ſtatute of W. 1. cap. 40. wherein obſerve what the oath was by the common law. *Aliquando patria ſtat pro campione et aliquando in bre. de recto campio ſtat pro patria. Campio* is derived *à campo*, becauſe it is publickly ſtroken in the field, and is called camp-fight: and is taken in the common law for one that ſtriketh a legal camp-fight or combat in another mans quarrel: in Latin he is called * *pugil à pugna*. But the defendant in an appeal that is to combat, is not called a champion, becauſe he fighteth for himſelfe. And theſe combats in caſes whereof the conuſance belongs to the common law, are to be directed by the judges of the common law *ſecundum legem et conſuetudinem Angliæ*, and not by the conſtable and marſhall by the civill law, as all our ancient authors and bookes aboveſaid do agree, which alſo is apparant by the ſtatute of 13 R. 2. ca. 2.

[c] Judgement in law againſt a recreant and craven champion is, *perdere liberam legem*. See a notable record hereof R. pa. 55 H. 3. m. 3. Glanvil, li. 2. ca. 3. lib. 14. cap. 1.

[d] Mirror cap. 3. § Ordinatio pugnantium, L'horrible mote de craven.

[e] 41 E. 3. cor. 98. *creant* for *recreant*. Bract, lib. 3. f. 141. Brit. fo. 42. 81. Fleta lib. 1. ca. 32. 19 H. 6. fo. 35. 21 H. 6. 34.

* Mir. c. 3. §. ubi ſu.

[f] Glanvil. lib. 2. cap. 19. Legem terræ amittentes perpetuam infamiæ notam incurrunt. See the firſt part of the Inſt. Sect. 514. 27 Aſſ. 59. liberam legem, qui, &c.

[g] 1 H. 6. 6. 3 H. 6. 55. See the oath in appeal, Bracton, lib. 3. fo. 141. b. Britton, fo. 42. Fleta, lib. 1. ca. 32. Glanvil, lib. 2. c. 3. lib. 9. cap. 1. Et lib. 14. ca. 1. 9 H. 4. 3. 17 aſſ. 3. 17 E. 3. 2. 9 E. 4. 25. Fleta ubi ſup. lib. Int. Co. fo. 182. 55 H. 3. ubi ſup.

Judgement in an Indictment of Conſpiracie, &c. where the Party indicted is legitimo modo acquietatus. [222]

Nota, the judgement in this caſe is, as in caſe of attaint againſt a jury, (whereof we ſhall ſpeak hereafter), viz. *Quòd committantur gaolæ domini regis, et quod omnia terræ et tenementa præd. R. & C. capiantur in manum domini regis, et devaſtentur, et extirpentur, et uxores et liberi eorum amovcantur, et omnia bona et catalia eorundem R. & C. forisfaciant domino regi, et amodo amittant liberam legem imperpetuum.*

4 H 5. Indict. 220. Tr. 18 E. 3. coram rege Rot. 148. Walt. judicium reddit. contr. Conſpiratores. Paſch. 32 E. 3. Rot. 58 Somerſ. 27 Aſſ. 59. 24 E. 3. 34. 43 E. 3. 33. b. Vid. Artic. ſuper cart. cap. 10.

Nota in this judgement five ſevere puniſhments. 1. That their bodies ſhall be impriſoned in the common gaole. 2. Their wives and children amoved out of their houſe. 3. That all their houſes

and lands ſhall be ſeiſed into the kings hands, and the houſes waſted and the trees extirpated. 4. All their goods and chattels forfeited to the king. 5. That they for ever ſhall loſe the freedome and franchiſe of the law. That is, firſt, they ſhall never be of any jury or recognitors of aſſiſe. Secondly, nor ever be received for a witneſſe in any caſe. Thirdly, that they ſhall never come into any of the kings courts, but make attornies, if they have any thing to do there. And this is called a * villanous judgement, becauſe of the villany and infamy which they deſerve againſt whom it is given: And all is inflicted by the common law, for that the offenders by falſe conſpiracy under the pretext of law, by indictment of treaſon or felony and legall proceeding thereupon, ſought to do the greateſt injuſtice by falſe conſpiracy to ſhed his blood, who afterwards is thereof *legitimo modo acquietatus.*

* 24 E. 3. fo. 33. 27 Aſſ. 53.

But in a writ of conſpiracy at the ſuit of the party grieved, the judgement is, damages to the party, fine to the king, and impriſonment. And the reaſon thereof is, firſt, for that when they are indicted at the ſuit of the king, the judgement is ſo ſevere, for that they falſely conſpired in the kings name, and at the kings ſuit by indictment, &c. to do ſo horrible injuſtice: therefore at the kings ſuit they ſhall be heavily puniſhed. Secondly, for that as it is ſaid in 15 E. 2. *De exilio Hugonis, &c.* the law which was inſtituted for the maintenance of peace and of good men, and the puniſhment of the evill, is turned to the diſheritance of the great men, and deſtruction of the people. Thirdly, for that the judgement at the kings ſuit is by the common law, and the action of the party is given by ſtatute, which giveth no ſuch puniſhment: but the party in his action, in reſpect of the danger of his life, is to recover anſwerable damages. Of conſpiracy ſee the Regiſter, fol. 134. a & b. & 188. F. N. B. 114, 115, &c. Stanf. pl. cor. fol. 172, 173, 174, 175, &c. and in the new Book of Entries, fol. 109. a preſident of a conſpiracy upon an indictment of felony.

4 H. 5. judg. acc. 24 E. 3. 34. 27 Aſſ. 59.

4 E. 3. 33 b. Tr. 15 Eborum.

It is enacted, that ſuch as be attainted of confederacy or conſpiracy, ſhall have no office of the grant of the king, queen, or other noble, neither ſhall be ſheriffe or eſcheator.

Parl. 17 E. 3. nu. 50.

Judgement in an Attaint.

1. That the plaintife ſhall be reſtored, &c. and the defendant party to the record ſhall be fined in reſpect the falſe verdict was given for him *(cui bono)* by the common law.

Lib. Intr. Raſtal. fo. 92. a. 9 E. 4. 51. 4 H. 5. ubi ſup. 15 Aſſ. 2. Kelway 130. b. Glanvil. lib. 2. cap. 19. Bracton, lib. 4. fo. 129. Brit. fo. 237, 238. Mirror, ca. 3. § de attaint. Flet. lib. 5. ca. 21. Apud. Northalverton in com. Eborum first part of the in attaint, Kanc.

The judgement againſt the petit jury is, as it is in caſe of conſpiracy at the ſuit of the king, as is aboveſaid, and in no other, but in thoſe two caſes, that villainous judgement is given. See 8 E. 2. Aſſ. 396. and 42 E. 3. 26. b. judgements given in attaint, *et nota bene.* 16 E. 3. tit. Judgement, 109. 21 H. 7. 83. Kelway. a good preſident of a judgement given in an attaint. Forteſcue, cap. 26. Concerning Attaints, ſee the ſecond part of the Inſtitutes, Marlbr. cap. 14. W. 1. cap. 37, &c.

coram Hen. de Guildeford & aliis juſt. aſſignatis an. 35 E. 1. attincta. See the Inſtitutes, ſect. 514. verb. [en attaint.] Vide Mich. 3 H. 4. Rot. 149. Judgment

But

But now by the ſtatute of 23 H. 8. cap. 3. the ſeverity of the puniſhment is moderated, * if the writ of attaint be grounded upon that ſtatute: but the party grieved may at his election either bring his writ of attaint at the common law, or upon that ſtatute: but all attaints, either at the common law or upon the ſtatute are to be taken before the king in his bench, or before the juſtices of the common pleas, and in no other courts.

This act of 23 H. 8. provideth for divers miſchiefs which were at the common law, and giveth to thoſe of the pety jury divers pleas, which they could not have at the common law, and hath been well expounded. 7 E. 6. Dier, 81. b. Sir John Ailifs caſe. 3 & 4 Ph. and Mar. 129. b. Heydons caſe. 3 Eliz. 201. Clovils caſe. 3 Eliz. 202. Auſtens caſe. 7 Eliz. 23. b. Stephens caſe. See the record thereof upon the ſtatute of 23 H. 8. for it is an excellent preſident.

And generally of attaints, ſee Lib. fo. 111. 112. Lib. 3. fo. 4. Lib. 6. fo. 4. 14. 25. 26. 44. 80. Lib. 8. fo. 60. Lib. 9. fo. 12. Lib. 10. fo. 119. Lib. 11. fo. 6. 43. 62. See alſo the new book of Entries, 63. 66. 68. 70. 73. 76. 77. 81. 83. 85. 86, &c.

Judicium de corrupto Judice.

We could not paſſe over a ſtrange judgement of *ſuſpendatur, &c.* as in caſe of felony (which we have touched before in the chapter of Bribery given againſt Sir William Thorpe, lately before chief juſtice of England, which we finde of record in theſe words. *Proceſſus factus an.* 24 E. 3. *contra Willielmum Thorp chivalier nuper capitalem juſticiarium coram Rico. comite Arundel. T. de Bellocampo comite Warw. Willielmo de Clinton comite de Hunt. Joh. de Gray de Rotherſfield ſeneſchallo hoſpitii regis, et Barthol. de Burgerſ. camerar. regis: pro eo quod idem Wiliielmus Thorp nuper capitalis juſticiarius domini regis ad placita coram ipſo rege tenenda, dum ſtetit in officio, cepit munera contra juramentum ſuum, viz. de Ricard. Saltley* 10 *li. de Hildebrando Boreſward* 20 *li. de Guilberto Hollyland* 40 *li. de Tho. Darby Sancti Botulphi, et de Roberto Dalderby* 10 *li. qui pro diverſis feloniis, falſitatibus, et trangreſſionibus coram ipſo Willielmo in ceſſione ſua apud Lincolne anno* 23 *fuerint indictati, et per ipſum Willielmum bre. de exigendo verſ. eos reſpect' fuit: quæ omnia et ſingula dedicere non potuit: ideo adjudicatum fuit prout ſequitur, viz. Conſideratum eſt per dictos juſticiarios aſſignatos ad judicandum* [a] *ſecundum voluntatem domini regis, et ſecundum regale poſſe ſuum, quòd quia prædictus Willielmus de Thorpe qui ſacramentum domini regis quod erga populum habuit cuſtodiendum fregit* [b] *malicioſe, falſe, et rebelliter in quantum in ipſo fuit, et ex cauſis ſupradictis per ipſum Willielmum, ut prædictum eſt, expreſſe cognitis, ſuſpendatur. Et quod omnia* [c] *terræ et tenementa, bona et catalla ſua domino regi remaneant forisfacta. Et poſtea dominus rex mandavit bre. ſuum ſub privato ſigillo,* all in French, and there entred *de verbo in verbum. Ideo conſideratum eſt quod executio judicii prædicti de ſuſpenſione ejuſdem Willielmi omnino ceſſet et ei pardonetur. Et quod idem Willielmus remittatur priſonæ turris prædict. ad gratiam domini regis expectandam, &c. Et non eſt intentio domini regis quod hujuſmodi judicium in conſimili caſu verſus quemcunque alium ex quacunq; cauſa ſe teneat*

Rot. pat. anno 24 E. 3. part 3. m. 2. in dorſ. & Rot. pat. anno 25 E. 3. part 1. m. 17.

In toto 80 li.

[a] The effect of the words of the oath hereafter mentioned.

[b] Nota, here is neither *felonice*, nor *proditorie* in this indictment, but *rebelliter*

[c] According to the ſaid oath, for otherwiſe the king had no colour to have the forfeiture of all his lands for felony, but every lord of whom they were reſpectively holden, &c.

teneat vel extendat, ſed ſolummodo verſus eos qui prædictum [d] *ſacramentum fecerunt, et fecerunt, et fregerunt et habent leges regales Angliæ ad cuſtodiend'.*

[d] Nota prædictum ſacramentum.

[e] We have alſo found, that at a parliament holden at Weſtminſter in *octabis purificationis beatæ Mariæ, anno* 25 E. 3. holden before Lionel duke of Clarence by force of the kings commiſſion, &c. commandement was given, that the record of the ſaid judgement againſt the ſaid Sir William Thorp ſhould be brought into the parliament, and there to be openly read before the nobles of the parliament to hear every of their advices, which was done accordingly, and there the nobles affirmed the judgement.

[e] Rot. Parl. in Oct. Pur. an. 25 E. 3. nu. 10.

And theſe words in the ſaid judgement, *Ad judicandum ſecundum voluntatem domini regis, et ſecundum regale poſſe ſuum*, and that his lands ſhould be forfeit to the king, *et prædict. ſacramentum*, were grounded upon the oath of the kings juſtices in *anno* 18 E. 3. the concluſion of which oath is, [upon pain to be at the kings will, body, lands, and goods, thereof to be done as pleaſeth him.] We deſirous to ſatisfie our ſelf herein, ſearched for the record of this oath, and albeit there is a parliament roll of this parliament, and other acts, then paſſed by authority of parliament, be entred into the ſaid roll, yet this is not; for that it had not the warrant of an act of parliament. It ought to have been printed amongſt the ſtatutes of the realm, and the title of them is, Here followeth the oath of the juſtices made in the ſame eighteenth year, but ſaith not at the parliament, &c. but after it became to be printed: and that which is printed in *anno* 20 E. 3. ca. 1. is but a recitall made by the king alone, and no act of parliament: for it appeareth by that which precedeth, and by the oath it ſelf, that it was the act only and commandement of the king, for it beginneth: firſt, we have commanded all our juſtices, &c. which former part was but a recitall of ſome precedent act: and then followeth, we have ordained and cauſed our ſaid juſtices to be ſworn, &c. ſo as the oath was deviſed by the king, and the juſtices ſworn before this parliament. Laſtly, it is there ſaid and concludeth: and for this cauſe we have encreaſed the fees of our ſaid juſtices, &c. which the king of himſelf did before this act alſo.

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And we have an ancient manuſcript of the acts of parliament in *ann.* 18 E. 3. and the oath is not within it.

And it appeareth by Fleta, that the puniſhment of a corrupt judge, that receiveth gift or reward was, *Si inde convictus fuerit, quòd imperpetuum à concilio regis excludatur; terraſque, res, redditus, et proventus bonorum ſuorum amittat per unum annum: qui, ſi proventus non habuerit, puniatur per diſcretionem regni et conſiliariorum regis.* And that which Fleta calleth *ſacramentum juſtic'*, in Vet. Magna Carta, is named, *juramentum conſiliariorum regis:* for the judges of England are of the kings counſell (as elſewhere hath appeared) for, in, and concerning the laws of the realm, in which oath alſo the ſaid fatall clauſe is omitted.

Fleta, li. 1. ca. 17. § Cum igitur non ſit, &c.

Vet. Mag. Cart. 1. parte fo. 165. Vide Bract. li. 3. fo. 109. Sacrament' Juſtic' itiner' and that then was the effect, de ſacrament' Juſtic' reſidentium.

See the Mirror cap. 4. §. *de faux judges*, and ca. 5. §. 1. of the law in the time of king Alfred, how many juſtices were in one year hanged, as homicides, for their falſe judgements: but that law hath been long ſince deleat and antiquated, and yet may ſerve for a memoriall of the time paſt.

The offence of bribery was puniſhed by fine, and ranſome, and loſſe

Vid. Flet. l. 2. c. 7. § Item atrox eſt injuria, &c.

loſſe in the reign of E. 1. as in the chapter of Extortion and Bribery before appears: only Sir Thomas Weyland chief juſtice of the common pleas, took ſanctuary, and before a coroner confeſſed himſelf guilty of murder, and according to the courſe of the common law abjured the realm, ſo as indeed he was attainted of felony, (which caſe had been vehemently urged) but it was not for bribery, but for murder, as any other man might have been.

But to winde up the thred of this diſcourſe with three acts of parliament. Firſt, with the ſtatute of 8 R. 2. wherein it is recited, that whereas in the time of king E. 3. it was ordained, that juſtices as long as they ſhould be in office, ſhould not take gift or reward, and ſo forth, as in Veteri Magna Carta (without the ſaid fatall clauſe) that act provideth, that the oath without that fatall clauſe ſhould extend as well to the barons of the exchequer, as to the juſtices, and expreſſed the penalty of all to be (according to the common law) viz. loſſe of office, fine and ranſome. But at the next parliament, viz. 9 R. 2. the ſaid act of 8 R. 2. for that it was [a] very hard, and needed declaration, was made of no force till it be declared in parliament. [b] Afterwards at the parliament holden 11 H. 4. it was debated what puniſhment great officers there named counſellors of the king, and judges, &c. ſhould have, which ſhould take any gift, reward, or brocage for doing of their offices or ſervices: in the end it was declared and enacted by authority of parliament, in theſe words following. *Item que nul chancelor, treaſorer, garden del privy ſeal, counſellier du roy ſervientes a counſiell du roy, ne nul autre officer, * jugge ne miniſter du roy pernont fees ou gages de roy pur lour dites offices ou ſervice, preigne en nul manner, en temps avenir aſcun manner de [c] done ou brocage de nulluy pur lour ditz offices et ſervices affaire, ſur peine de 1 reſponder a roy de la treble de ceo, que † iſſi preignont, 2 et de ſatisfier la party, 3 et punis al voluntle roy, et 4 ſoit diſcharges de ſon office, ſervice, et counſell pur touts jours, et que cheſcun que verra purſuer en la dit mattier eit la ſute ſibien pur le roy come pur luy meſme, et eit la tierce part del ſumme de que la partie ſoit duement convict.* Reſponſ. *Le roy le voet.*

This act being by authority of parliament, hath limited the puniſhment (amongſt others) of corrupt judges, of whom now we entreat, ſo as the former example of Sir William Thorp is not now to be followed, which we affirm not in favour of ſordid bribery, (which we hate, as in the proper chapter thereof before appeareth) but in advancement of juſtice and right, which is the end of our labour in this and other of our works; [b] and therefore have cauſed that good act that hath lived ſo long in obſcurity, for the better notice and obſervation thereof, to be put to the preſſe, which never was yet printed; and the cauſe thereof was, for that in the margent of the parliament roll of this act, it is written, *reſpectuatur per dominum principem et concilium:* a ſtrange preſumption without warrant of the king his father, and of the parliament, to cauſe ſuch a *reſpectuatur* to be made to an act of parliament.

The like he did to another act in the ſame parliament, nu. 63. concerning attorneys, the like whereof was never done in any former or latter parliaments. * This was that prince Henry, who keeping ill company, and led by ill counſell, about this time aſſaulted (ſome ſay) and ſtroke Gaſcoign chief juſtice ſitting in the kings bench, for that the prince endeavouring with ſtrong hand to reſcue

8 R. 2. ca. 3. Vide Vet. Mag. Cart. fo. 165. a. ubi ſupra.

9 R. 2. cap. 1.

[a] In reſpect of the recitall.

[b] Ro. Par. 11 H. 4. nu. 28. not heretofore printed. Vid. 1 H. 4. nu. 99.

* Nota.

[c] This is agreeable to the law of God, Deut. 16. 19. Non accipies perſonam, nec munera, quia munera excæcant oculos ſapientum, et mutant verba juſtorum. Exodus 23. 8.

† [225.] Nota four puniſhments. 1. By the court of juſtice where the matter ſhall depend (as hath been often obſerved) by fine and impriſonment.

[a] In the oath of the juſtices in Wales, that fearful clauſe is omitted, neither is it in the oath of the barons of the exchequer of England.

[b] Veritas nihil veretur niſi abſcondi.

* See Sir Tho. Eliot in his Governour, &c. Holl. Chron. 543. a.

reſcue a priſoner, one of his unthrifty minions indicted and arraigned at the kings bench bar for felony, was prevented of his purpoſe by the perſwaſion and commandement of the chief juſtice, for which the chief juſtice committed the prince to the kings bench, whereof ſome of his followers inſtantly complained to the king his father: who informing himſelf of the true ſtate of the caſe, gave God infinite thanks, that he had given him ſuch a judge, as feared not to miniſter juſtice, and ſuch a ſon, as could ſuffer ſemblably and obey juſtice. And this is that prince, who abandoning his former company and counſell, and following the advice of grave, wiſe, and expert men, whom he made choice of to be of his councel, became a victorious and vertuous king, and proſperous in all that he took in hand, at home and abroad.

For the duty of judges, it is truly ſaid (as before hath been ſaid) that *judex debet habere duos ſales, viz. ſalem ſcientiæ, ne ſit inſipidus, et ſalem conſcientiæ, ne ſit diabolus.* And what perſons ſhould be judges, ſee Bracton, lib. 1. cap. 2. & lib. 3. fo, 106. & Fleta, lib. 1. cap. 17. § Caveat, and the Mirror, ca. 2. §. 2. de judges, and Rot. Parl. 17 E. 3. nu. 3. 10.

Anno 1 Mar. ſtat. 2. ca. 2. in print. See the Articles of Concord, 21 Maii anno Dom. 1420. et anno 8 H. 5. between king H. 5. and Charles the French king, whereby the crown of France after the death of the ſaid Charles, was eſtabliſhed to H. 5. and his heirs. Artic. 7, 8, &c.

To theſe we will add, that upon the concluſion of a marriage then to be had between Philip the ſon of the emperour, and prince of Spain, it was nobly and wiſely provided by the queen, the lords ſpirituall and temporall, and the commons by authority of parliament (amongſt many other excellent proviſions worthy of obſervation) that the ſaid prince ſhould not promote, admit, or receive to any office, adminiſtration or benefice in the realm of England, and the dominions thereunto belonging, any ſtranger, or perſons not born under the dominion and ſubjection of the moſt noble queen of England: and that the ſaid moſt noble prince ſhould doe nothing whereby any thing might be innovated in the ſtate or right, either publique or private, or in the lawes and cuſtomes of England, or the dominions thereunto belonging, but ſhall contrariwiſe confirm and keep, to all eſtates and orders, their rights and priviledges.

And it is there further provided for the future, &c. that if the ſaid prince ſhould have iſſue male or female, the order of ſucceſſion is there declared, but with this proviſo. Provided nevertheleſſe, and expreſly reſerved in all and ſingular the above declared caſes of ſucceſſion, that whatſoever he or ſhe be, that ſhall ſucceed in them, they ſhall leave to every of the ſaid realms, lands and dominions whole and entire their priviledges, rights, and cuſtomes, and the ſame realms and dominions ſhall adminiſter, and cauſe to be adminiſtred by the naturall born of the ſaid realms, dominions, and lands.

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By this, Philip (after king of Spain) could not prefer any ſtranger born to any office of judicature, &c. within the realm of England, or dominions of the ſame, nor all the time he was within this realm, ever attempted the ſame.

Vide Camden. El. 322. Artic. inter reginam Eliz. et Franciſcum ducem Alonſon anno 23 El. populo ſuper importune ut nuberet ſuadente in comitiis.

And in the articles, *De matrimonio prælocuto inter reginam Elizabetham et ducem de Alonſon*, amongſt others it was expreſly provided, *Quod dux nullum extraneum ad aliquod officium in Anglia promovebit, et nihil in jure mutabit, &c.*

Alſo

[a] Alſo king James wiſely provided by authority of parliament, by the advice of the lords ſpirituall and temporall, and commons in that parliament aſſembled, that whereas in regard of ſome difference and unequality of the laws, trials, and proceedings * in caſe of life, between the juſtice of the realm of England, and that of the realm of Scotland, it appeareth to be moſt convenient for the contentment and ſatisfaction of all his majeſties ſubjects to proceed (with all poſſible ſeverity) againſt ſuch offenders in their own country according to the laws of the ſame, whereunto they are born and inheritable, and by and before the naturall born ſubjects of the ſame realm, if they be there apprehended: And by the next clauſe it is provided, that felonies committed by Engliſhmen in Scotland, ſhall be enquired of, heard, and determined before juſtices of aſſiſe, or commiſſioners of oier and terminer, and gaol-delivery, being naturall born ſubjects within the realm of England, and none other. And the like in another clauſe with an addition of juſtices of peace to be naturall born ſubjects within England; and God bleſſed and proſpered this act with happy and deſired ſucceſſe.

[a] 4 Ja. regis, ca. 1. about the midſt.

* That caſe being then in queſtion.

But contrariwiſe, *Petrus de Rupibus*, or of the Rocks, being a Gaſcoign born, preferred to be biſhop of Wincheſter by king John, and being a principall counſeller about king H. 2. both in his young years, did after in his riper age prefer to offices about the king, ſuch Gaſcoigns as were of his blood or alliance, (whereof one of his kindred, ſome ſay his ſon, Peter de Orival treaſurer of England) to the great grief and diſcontentment of the nobility of England to have a Gaſcoign born in place above them. And what heavy event enſued thereupon, let hiſtorians inform you, for it is grievous to me to remember it.

Math. Par. pag. 363. 380. 383, &c. Hol. Chron. pag. 231. & 1071. a. b.

If you deſire to ſee ſomewhat concerning eccleſiaſticall offices, promotions, and benefices, firſt what petitions have been made in parliament againſt aliens or ſtrangers; look in the parliament rolls of 50 E. 3. nu. 96, 97. 120. 13 E. 3. nu. 23. 17 E. 3. nu. 59, 60. 18 E. 3. nu. 38. 2 R. 2. nu. 6 H. 4. nu. 48. 4 H 6. nu. 29, &c. And what laws have been made that aliens or ſtrangers ſhould not be advanced to the ſame; *Vide* 35 E. 1. Statut. de Carliſle. 3 R. 2. ca. 3. 7 R. 2. ca. 12. Rot. Parl. 13 R. 2. not in print. 1 H. 5. ca. 7. 4 & 5 Ph. and Mar. ca. 6.

Vide 50 E. 3. nu. 165. for the keeping of the caſtle of Nottingham. Vide 18 E. 1. Rot. Parl. nu. Solomon de Rolfes caſe.

CAP. CII. [227]

Forfeiture, Confiſcation, &c.

NOTA *confiſcare et forisfacere* are *ſynonyma*, and *bona confiſcata* are *bona forisfacta*: *Fiſcus* properly ſignifieth a panier or hamper of oſiers, wherein the Romanes kept their treaſure, and by the figure of *metonymia continens pro contento*, it is taken for the treaſure it ſelf, *unde confiſcare*, and *bona confiſcata*, and thereupon it is ſaid, *Quod non capit Chriſtus, capit fiſcus.*

For the derivation of *forisfacere*, ſee the firſt part of the Inſtitutes, ſect. 74. fo. 59. a. 3 E. 3. forfeit 24.

Of forfeiture of lands and tenements, and other hereditaments for

for high treaſon, petit treaſon, felony, miſpriſion of treaſon, premunire, and in ſome caſes of miſpriſion, * and what hereditaments which be not holden ſhall be forfeited for high treaſon, and ſhall not eſcheat for petit treaſon or felony, we have ſpoken before in their ſeverall chapters, &c. now let us ſpeak of forfeiture of goods and chattels in theſe and ſome other caſes.

* See before cap. High treaſon, verbo [De t'res et tenements, &c.] fol. 18 & 19. Et cap. de Petit treaſon, Verb. [Et de tiel manner de treaſon,] &c. fo. 21.

[a] Of theſe the forfeiture of ſome of them muſt appear, or be found of record, and therefore theſe cannot be claimed by proſcription; of other ſome the forfeiture need not appear, or be found of record, and therefore theſe may be gained by preſcription.

[a] See the 1 part of the Inſtitutes, of both theſe branches.

[b] Of the former ſort be *bona et catalla proditorum, felonum, utlagat', in exigend' poſitorum, fugitivorum, deodand' annus, dies, et vaſtum, &c.* and all other forfeitures which muſt appear or be found of record.

[b] See the 1 part of the Inſtitutes, ubi ſupra, both the former and the latter ſort.

Of the latter ſort be treaſure trove, *bona et catalla waviat', extrahur' wreccum maris, &c'*

[c] If a traitor or felon either reſcue himſelf, or will not ſubmit him to be arreſted, but reſiſteth, and in reſiſtance is ſlain; upon preſentment hereof he forfeiteth all his goods and chattels.

[c] 3 E. 3. Cor. 290. 312.

[d] If a felon in purſuit wave his own goods, they are forfeited, yet are they not *bona waviata.*

[d] 29 E. 3. 29. 45 E. 3. Cor. 100.

If in appeal of robbery the plaintif omit any of the goods ſtoln, they are forfeit to the king for the favour, which the law preſumeth, the plaintif beareth to the felon: and for that he cannot have reſtitution for more then is in his appeal.

In appeal of robbery of goods, if the jury find that the defendant found them in the high way, in this caſe the plaintif for his falſe appeal, in ſeeking the blood of the innocent, ſhall forfeit his goods to the king.

3 E. 2. Cor. 367, 368.

If one arraigned for treaſon or petit treaſon, challengeth peremptorily above thirty five, he forfeiteth his goods, and judgement of *paine fort et jure* ſhall be given againſt him, as one that refuſeth the triall of law, by challenging three full juries, and like unto one that ſtands mute and will not put himſelf upon the triall of the law.

3 H. 7. 12.

By the ſtatute of 22 H. 8. it was provided that no perſon arraigned for any petit treaſon, murder or felony, ſhall be admitted to any peremptory challenge above the number of twenty: but at this day in caſe of high treaſon, notwithſtanding the ſtatute of 33 H. 8. cap. 22, 23. and petit treaſon notwithſtanding the act of 22 H. 8. he may challenge thirty five according to the common law, for it is enacted by the ſtatute of 1 & 2 Ph. and Mar. cap. 10. that all trialls hereafter to be awarded, or made for any treaſon, ſhall be had and uſed only according to the due order and courſe of the common law, ſo as to petit treaſon the act of 22 H. 8. is abrogated, but in caſes of murder and felony he cannot challenge peremptorily above the number of twenty, and if he challenge above twenty, and under thirty ſix, he forfeiteth not his goods and chattels, for no law giveth forfeiture for challenging above twenty; but the court ought to over-rule the challenge: neither is he convicted by the challenging above twenty, as he was by the common law by challenge of three juries, for the act of 22 H. 8. extendeth not to any conviction, but to the challenge only.

22 H. 8. c. 14. 32 H. 8. ca. 3. See before *Peine fort et dure* in the next preceding chapter. See before in the chapter of Petit treaſon, fo. 26.

If

If the party defendant be attached or diſtreyned by proces out of any court of record, county, by force of a juſticies, &c. hundred court, or other court baron, and make default, the goods or iſſues are forfeited, and upon the attachment the ſherif or other officer may take the goods with them: and this is the reaſon that upon the attachment the ſherif or other officer ought to return the certainty of the goods and the value, and it is not ſufficient to return that he hath attached or diſtrained the defendant by goods to ſuch a value, and ſo upon the diſtreſſe the iſſues muſt be returned in certain, becauſe they are upon default to be forfeited.

8 E. 2. Forfeit. 17. 23 E. contumac. 17. 7 H. 6. 9. 26 H. 6. Attachment 4. 28 H. 6. 9. 34 H. 6. 29. 49. 32 H. 6. ibidem 9 H. 7. 6. Broke tit. Forfeit. 4. 3 El. Dier, 199. pag. 54.

What a perſon convict of felony before attainder ſhall forfeit: ſee the firſt part of the Inſtitutes, ſect. 745. verb. Attaint, fo. 391.

1. part of the Inſtitutes. § 745.

See *ſupra* in the chapter of Deodands, and in the chapter of Wreck, *vid.* Stanford Pl. Cor. fo. 183, 184. &c.

CAP. CIII.

Of the Seiſure of Goods, &c. for Offences, &c. before Conviction.

REGULARLY the goods, &c. of any delinquent cannot be taken and ſeiſed to the kings uſe, before the ſame be forfeited. 1. Vide 25 E. 3. ca. 14.

The ſame cannot be inventoried, and the town charged therewith, before the owner be indicted of record. 2.

It is to be obſerved, that there is two manner of ſeiſures, one verball without taking, removing, or carrying away, only to make an inventory, and to charge the town: and the other an actuall ſeiſure, and taking away the ſame. 3. 26 Aſſ. p. 32. 43 E. 3. fo. 24. 44 Aſſ. p. 14.

As to the firſt, the ſame is manifeſt by Bracton, and all our ancient authors: and let Bracton ſpeak for them all. 7 H. 4. fo. ultimo. Lib. 8. fo. 171.

Priſones impriſonati, antequam convicti fuerint, de terris ſuis diſſeiſiri non debent, [a] *nec de rebus ſuis quibuſcunque ſpoliari; ſed dum fuerint in priſona debent de proprio in omnibus ſuſtentari, donec per judicium deliberati fuerint vel condemnati, &c.* And fo. 136. b. he ſaith thus, *Qui pro* [b] *crimine vel felonia magna, ſicut pro* [c] *morte hominis, captus fuerit et impriſonatus, vel ſub cuſtodia detentus, non debet ſpoliari bonis ſuis, nec de terris ſuis diſſeiſiri, ſed debet inde ſuſtentari donec de crimine ſibi impoſito ſe defenderit, vel convictus fuerit,* [d] *quia ante convictionem nihil forisfacit; et ſi quis contra hoc fecerit, fiat vicecom' tale bre.* [e] *rex vic' ſalutem. Scias quòd* [f] *proviſum eſt in curia noſtra coram nobis, quod nullus homo captus pro morte hominis, vel pro alia felonia pro qua debeat impriſonari, diſſeiſietur de terris, tenementis vel catallis ſuis, quouſque convictus fuerit de felonia de qua* [g] *rectatus eſt, ſed quam cito*

See the 1 part of the Inſtitutes, ſect. 745. f. 391. a. Bract. l. 3. f. 123. Brit. fo. 4 b. Fleta, li. 1. c. 25, 26.

[a] Nota the generality of theſe words. Hil. 29 E. 1. Coram rege in Aſſ. Campions caſe.

[b] In this word treaſon is comprehended.

[c] Nota, Mort del home eſt felonia magna. [d] Note this reaſon extends as well to treaſon, as to felony. [e] This writ is in the Regiſt. [f] That is, by Magna Cart. cap. 29. and that act extends to treaſon as well as to felony, 5 E. 3. cap. 9. Fleta, li. 2. c. 26. accord. [g] Id eſt, indictatus, for before indictment no verball ſeiſure can be made, or inventory taken. Stat. de 4 E. 1. de offic. coronatoris, et aliquis culpabilis inveniatur, &c. Britton, f. 4. b. accord.

captus

captus fuerit per viſum cuſtodum placitorum coronæ noſtræ, et per viſum tuum et legalium hominum apprecientur catalla ipſius capti, et imbrevientur, et ſalvo cuſtodiantur per [h] *balivos ipſius qui capitur, et qui bonam inveniant ſecuritatem* * *de reſpondendo coram juſticiariis noſtris cum ab eis exigantur: ſalvo tamen eidem capto et familiæ ſuæ neceſſariæ, quandiu fuerit in priſona, rationabili eſtoverio ſuo, &c. i. rationabili victu et veſtitu.* 3 E. 3. Coron. 366. 13 H. 4. 13.

[h] So it was in Bractons time, but afterwards the townſhip was charged and anſwerable for the ſame. Britton, fo. 18. Mirror, c. 2. § 13. Fleta, li. 1. c. 25, 26. 43 E. 3. 18. a.

By the ſtatute of 1 R. 3. cap. 3. it is enacted and declared, That neither ſherif, eſcheator, bailife of franchiſe, [a] nor other perſon take or ſeiſe the goods of any perſon arreſted, or impriſoned, before he be convicted or attaint of the felony, [b] according to the law of England, or before the goods be otherwiſe lawfully forfeited, upon pain to forfeit double the value of the goods ſo taken to the party grieved.

[a] Note the generality of theſe words.

[b] Mic. 18 E. 1. Coram rege Ro. 34. Norff. Niſi quis appellatus indictatus vel cum manu opere captus fuerit, non competit regi ſecta contra ipſum.

So as *(ſuper toto materia)* theſe two concluſions are manifeſtly proved. Firſt, that before indictment, the goods or other things of any offender cannot be ſearched, inventoried, or in any ſort ſeiſed; nor after indictment ſeiſed, and removed, or taken away before conviction or attainder. Secondly, that the begging of the goods or ſtate of any delinquent accuſed or indicted of any treaſon, felony, or other offence before he be convicted and attainted, is utterly unlawfull, becauſe before conviction and attainder, as hath been ſaid, nothing is forfeited to the king, nor grantable by him. And beſides it either maketh the proſecution againſt the delinquent more precipitate, violent, and undue, then the quiet and equall proceeding of law and juſtice would permit, or elſe by ſome underhand compoſition and agreement ſtop or hinder the due courſe of juſtice for exemplary puniſhment of the offender. And laſtly, when the delinquent is begged, it diſcourageth both judge, juror, and witneſſe to doe their duty.

Begging of lands and goods before conviction, &c. unlawfull.

Cap. Itineris. It was an article of inquiry, *de hiis qui aliquid agunt per quod veritas et juſtitia ſuffocantur.*

See Lib. 7. f. 36, & 37. the caſe of penall ſtatutes, *et nota bene:* ſee alſo the ſtatute of 21 Jac. ca. 3. *à fortiori* in caſe of life. *Placitum coronæ* ought not to become in effect *placitum privatum.* And if it fall out that the party accuſed be *legitimo modo acquietatus*, let ſuch as begge him and proſecute againſt him be terrified by the villanous judgment againſt conſpiratours, which you may read before cap. Judgements and Execution.

CAP. CIV.

[230] ## Of Falſifying of Attainders.

Syers caſe, anno 32 Eliz.

AT twelfe ſeſſions of the peace holden at Norwich for the county of Norfolk, *anno* 32 Eliz. one Syer was indicted of burglary, ſuppoſed to be committed 1 *Auguſti anno* 31 Eliz. whereunto Syer pleaded not guilty. And upon the evidence it appeared that the burglary was committed 1 Septemb. *anno* 31 Eliz. ſo as at the time alledged in the indictment there was no burglary done;

done: and it was conceived that the very true day in the indictment was neceſſary to be ſet down in the indictment; for that the judgement doth relate to the day in the indictment, and ſo avoid feoffements, leaſes, &c. for that as it was alſo conceived) the feoffee, leſſee, &c. when the attainder is upon a verdict, ſhould not falſifie in the time of the felony: and thereupon the jury found Syer not guilty. And at the ſame ſeſſions Syer was again indicted for the ſame burglary done 1 *Septembris anno* 31 Eliz. when in truth it was done. And he that gave the charge at that ſeſſions doubted, whether upon this matter Syer might plead *auter foitz acquite* for the ſame burglary, (for ſeeing the offender is allowed no counſell, the court ought to do him juſtice and aſſigne him counſell *in favorem vitæ*, though he demand it not, to plead any matter in law appearing to the court for his diſcharge;) and thereupon he ſtayed the proceeding againſt him, and the aſſiſes being at hand he acquainted the juſtices of aſſize, Wray chief juſtice, and juſtice Peryam with this caſe, and with the doubts conceived thereupon; who anſwered him, that the like caſe had then been lately propounded by juſtice Peryam to all the juſtices of England; and by them three points were reſolved. 1. That the crown was not bound to ſet down the very day when the treaſon, felony, &c. was done, but the day ſet down in the indictment being before or after the offence done, the jury ought to finde him guilty, if the truth of the caſe be ſo; and if it be alledged before the offence done, to finde the day when it was done in *rei veritate*, for they are ſworn *ad veritatem dicendam*, and then the forfeiture ſhall relate but to the day of the verdict, which was the day of the offence done, and not to the day in the indictment. 2. That if the triers finde the offender guilty generally, yet the feoffee or leſſee, &c. if the offence be alledged in the indictment before it was done to their prejudice, may falſifie in the time, but not for the offence. For ſeeing the crown is not bound to ſet down the very juſt day when the treaſon or felony, &c. is done, and that the triers have chief regard and reſpect of the offence it ſelfe, God forbid, but that the ſubject might falſifie as concerning the time of the offence. 3. If the offender be found not guilty, he in that caſe might plead upon a new indictment, *auterfoitz acquite*: and ſo Syer in the caſe aforeſaid did, and was thereupon diſcharged according to the ſaid reſolutions. Nota three notable points reſolved, that never were reſolved in any book that we have read, and remember.

At the aſſiſes in Lent, 32 Eliz. in com. Norff.

Nota, The reſolution of all the judges.

If a man infeoffeth another of his land, and after is indicted of a felony ſuppoſed to be committed before the feoffment, and thereupon he is outlawed; the party himſelf is bound hereby, and cannot traverſe the felony, but the feoffee, &c. may; becauſe he is an eſtranger thereunto: for a falſe indictment without any tryall by verdict ſhall not binde the feoffee, &c. but that he may falſifie, either by traverſe of the felony it ſelfe, or of the time of the feoffement.

49 E. 3. 11. 7 E. 4. 1, 2.

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And ſo it is if a man maketh a feoffement of his land, and after taketh ſanctuary, and confeſſe the felony before the coroner by him to be done before the feoffement, and abjureth the realm; the feoffee ſhall falſifie the attainder by traverſing of the felony. And ſo it is if a man be indicted of felony, and is attainted by his own confeſſion, the feoffee ſhall falſifie the attainder by denying the felony.

11 H. 4. 94. 2 H. 5. Eſtop. 91. 7 E. 4. 1. 2. Vid. Rot. Parl. 23 H. 6. nu. 32.

felony. But otherwiſe it is if he be attainted upon a verdict given by twelve men, for then the feoffee ſhall not falſifie by traverſing of the offence, but of the time only.

Where the caſe in effect is, that 19 *Januarii anno* 1 *Mariæ*, a commiſſion of oier and terminer in London was directed to Sir Thomas White the lord maior of London, and to divers others; reciting, that where Sir Robert Dudley knight, 9 *Januarii anno* 1 *Mariæ* was indicted of high treaſon before Thomas duke of Norff. and 14 others commiſſioners of oier and terminer in the county of Norff. (where in truth that commiſſion was directed to ſo many, but the indictment was taken but before 8 of them only) granting to them or any four of them, authority to receive the indictment taken before 15 commiſſioners, and to proceed thereupon as ſpeciall juſtices of oier and terminer, &c. By pretext whereof they proceeded: and upon the confeſſion of the ſaid Sir Robert Dudley, gave judgement againſt him in caſe of high treaſon. [a] In this caſe it was adjudged, that Sir Robert Dudley, then earl of Leic. might falſifie the ſaid attainder by plea, becauſe it was void, and *coram non judice:* for that the ſaid latter commiſſioners [b] had no power to proceed upon an indictment taken before 8, but before 15, and ſo the judgement was void, and *coram non judice:* for whereſoever the judgement is void or *coram non judice*, the party is not driven to his writ of error, but may falſifie the attainder by plea, ſhewing the ſpeciall matter which proveth it void, or *coram non judice.* In which caſe the party forfeiteth neither lands nor goods. By which caſe it appeareth how neceſſary it is for judges, eſpecially in caſes of treaſon and felony, to look into the whole record, and the proceedings thereupon, before they give judgement, leſt they give an unlawfull and unjuſt judgment, by means whereof the party may loſe his life, &c.

[c] A and B were indicted, A as principall of felony, and B a acceſſory for receiving him. A fled and was attainted of the felony by outlawry. B the acceſſory (being ſeiſed of lands in fee holden of C) was arraigned upon the indictment and found guilty by verdict, and had judgement, and was hanged: C the lord entreth as lord by eſcheat: A the principall reverſeth the outlawry, and to the felony pleaded not guilty, and by verdict was found not guilty, and thereupon was by judgement acquited. The heir of B, brought an aſſiſe of mordanceſtor againſt C. the lord by eſcheat, who pleaded the outlawry of the principall, and the attainder of the acceſſory, his ſeaſon in fee, and the execution, and his entry as lord by eſcheat. [d] The plaintiſe ſhewed the reverſall of the outlawry by the principall, and his acquittall by verdict and judgement, whereupon the lord demurred in judgement. And it was adjudged that the plaintiſe in the writ of mordanceſtor ſhould recover againſt the lord by eſcheat. Upon which judgement we obſerve theſe five concluſions. 1. [e] That the attainder of the acceſſory hath a kinde of dependancy upon the attainder of the principall. For it is a maxime in law, that the acceſſory ought not to be put to anſwer before the principall be attainted; and by the reverſall and acquitall of the principall, the dependant judgement againſt the acceſſory cannot ſtand. 2. [f] That this attainder of the acceſſory may be falſified and avoided by the heir by plea, and is not driven to his writ of error; for that the attainder of the acceſſory is by matter in law avoided by record of as high nature as the

Pl. com. f. 390. Le Countee de Leic. caſe.

[a] Tri. 3 El.
[b] V. for this point 22 Aſſ. p. 64. 39 E. 3. 33, 34. 41 Aſſ. p. ult. 27 Aſſ. p. 55. 39 Aſſ. p. 6. 7 H. 4. 3. 9 H. 4. 1. 10 H. 6. 13. 36 H. 6. 32. 31 H. 6. 10. 4 H. 6. 24. 22 E. 4. 31. Colyns caſe. 2 H. 3. 10. 4 H. 7. 18. 2 H. 7. fo. Vide Rot. Parl. 18 E. 1. Rot. 11. Mountgom. Bogo de Knovil, &c.
[c] See this caſe temps E. 1. tit. Mordanc. 46. but not fully there reported. Vid. lib. 9. fo. 119. Lord Zanchers caſe.
[d] Where the anceſtor of the acceſſory was lawfully and in due form attainted of felony and yet the heire ſhall inherit by matter *ex poſt facto.*
[e] Vi. li. 5. fo. 119. b. Lo. Zanchers caſe. Debili fundamento fallit opus. 2 R. 3. fo. 12.
[f] 26 E. 3. 57. 7 H. 6. 44. 43 E. 3. 3. 4 E. 3. 36. 11 H. 4. 4. 6. 9 H. 6. 38. b. 8 H. 4. 4. 10 H. 6. 6. 6 E. 4. 8. 8 H. 7. 10. 13 E. 4. 4.

the attainder of the principall was. For in this caſe it is impoſſible that there ſhould be an acceſſory where there was no principall, of the ſame felony. 3. That the eſcheat of the land lawfully once veſted ſhall by this matter *ex poſt facto*, be deveſted. 4. Though there were no immediate diſcent to the heir, yet upon the judgement of the acquitall of the principall the writ of mordanceſtor was maintainable. Laſtly, that albeit the attainder of the acceſſory is avoided by judgement of law, yet the lord by eſcheat remain tenant of the land, until it be evicted from him by action or entry. And ſo it is if the principall be attainted of felony, and after the acceſſory is alſo attainted, if the principall reverſeth his attainder by writ of error, the attainder of the acceſſory dependant thereupon is reverſed. [232] 18 E. 4. 9. b.

A man commits treaſon or felony, and is thereof attainted in due form of law, and after this treaſon or felony is pardoned by a generall pardon; hereby the foundation it ſelf, viz. the treaſon or felony being by authority of parliament diſcharged and pardoned, the attainder (being builded thereupon) cannot ſtand, but may be falſified and avoided by plea, for he hath no other remedy by writ of error or otherwiſe. Diet 20 Eliz. 135. lib. 6. fo. 13, 14. in Arundels caſe.

In the county of Warwick there were two brethren, the one having iſſue a daughter, and being ſeiſed of lands in fee deviſed the government of his daughter and his lands, untill ſhe came to her age of ſixteen years, to his brother, and died. The uncle brought up his niece very well both at her book and needle, &c. and ſhe was about eight or nine years of age: her uncle for ſome offence correcting her, ſhe was heard to ſay, Oh good uncle kill me not. After which time the childe after much inquiry, could not be heard of: whereupon the uncle being ſuſpected of the murder of her, the rather for that he was her next heir, was upon examination *anno* 8 *Jac. regis* committed to the gaol for ſuſpicion of murder, and was admoniſhed by the juſtices of aſſiſe to find out the childe, and thereupon bailed him untill the next aſſiſes. Againſt which time, for that he could not finde her, and fearing what would fall out againſt him, took another childe as like unto her both in perſon and years as he could find, and apparelled her like unto the true child, and brought her to the next aſſiſes, but upon view and examination, ſhe was found not to be the true child; and upon theſe preſumptions he was indicted and found guilty, had judgement, and was hanged. But the truth of the caſe was, that the child being beaten over night, the next morning when ſhe ſhould go to ſchoole, ran away into the next county: and being well educated was received and entertained of a ſtranger: and when ſhe was ſixteen years old, at what time ſhe ſhould come to her land, ſhe came to demand it, and was directly proved to be the true child. Which caſe we have reported for a double caveat: firſt to judges, that they in caſe of life judge not too haſtily upon bare preſumption: and ſecondly, to the innocent and true man, that he never ſeek to excuſe himſelf by falſe or undue means, leſt thereby he offending God (the author of truth) overthrow himſelf, as the uncle did.

Falſifying concerning Goods.

Bract. lib. 3. f. 128, 129. a. Brit. ca. 12. fol. 20. 3 E. 3. Forfeit 25. 22 Aſſ. 96. 13 H. 4. 13.

[a] 4 H. 7. 18.

[b] 3 E. 3. cor. 296. & 344.

[c] 47 E. 3. 26. 13 E. 4. fo. 8. a. Travers de chattell al common ley.

[d] 27 Aſſ. p. 50. 41 Aſſ. p. 13. 44 Aſſ. p. 16. Lib. 5. fo. 111. Foxleyes caſe.

[e] Bra. li. 3. f. 129. a. 43 E. 3. 18. 7 E. 4. 17. a. per Cheke. 45 Aſſ. p. 9. Stanf. pl. cor. 284. d. 30 H. 6. tit. forfeit. 31. 19 E. 3. ibid. 19. 223. 45 E. 3. Aſſ. 9.

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8 E. 2. cor. 406.

If A be indicted before the coroner for the death of another, and that A fled for the ſame; hereby are all the goods and chattels of A forfeited which he had at the time of the verdict given; and this cannot be falſified by traverſe. For if the party be arraigned upon the ſame indictment before juſtices of gaole delivery, and is by verdict acquitted of the felony, and that he did not flee for the ſame; yet he ſhal forfeit his goods and chattels, but yet, [a] ſuch a *fugam fecit* may be falſified by matter in law; for if the indictment be void or inſufficient, there is no forfeiture. [b] But if a man be indicted before juſtices of oier and terminer, and is acquited by verdict, and they finde further that he fled for the ſame, his goods are forfeited which he had at the time of the verdict given; [c] and it being alſo found in particular what goods he then had, that may be traverſed by any that had property in thoſe goods.

There is alſo a *fugam fecit* in law. [d] As if a man be indicted or appealed of felony and proces continued againſt him, upon his default of appearance, and an exigent awarded againſt him, whereupon he appeareth, albeit he be after acquited of the felony, yet all his goods and chattels are forfeited by the awarding of the exigent upon this *fugam fecit* in law. [e] But this may be falſified by matter in law: for if the indictment or writ of appeal be inſufficient, or error be in the proces or exigent the ſame may be avoided by exception, and no forfeiture of goods. And there is no book to warrant the opinion of juſtice Stanford * in this caſe: for in 43 E. 3. the originall writ was good, *quod adnoto, non ut arguam, ſed ne ipſe arguar.* And alſo by matter in deed or record he may excuſe his abſence, as if he were in priſon or beyond the ſea, at the time of the exigent awarded, or if the king before the exigent doth pardon him.

A is indicted of petit larceny, and upon his triall is found not guilty, and that he did flye for the ſame, he ſhall forfeit his goods. And ſo it is if an exigent be upon ſuch an indictment awarded againſt him: but he may falſifie the ſame to free him of the forfeiture of his goods by ſuch means as is aforeſaid. See the firſt part of the Inſtitutes, ſect. 745. fol. 391. a.

Hæ leges vitam veſtram (generoſa juventus)
Inſtituunt, quæ ſunt fugienda, ſequendaq; monſtrant.

CAP.

CAP. CV.

OF PARDONS.

WE have ſpoken of the royall and eſtabliſhing vertue of juſtice: royall and eſtabliſhing I ſay, becauſe *juſtitia firmatur ſolium*, by juſtice the royall throne is eſtabliſhed. Prov. 16. 12. We are now to ſpeak of his mercy: for the ſame Holy Spirit ſaith, *Miſericordia et veritas cuſtodiunt regem, et roboratur clementia thronus ejus.* Mercy and truth preſerve the king, and by clemency is his throne ſtrengthened. Prov. 20. 28. And hereupon is the law of England grounded. *Non ſolum ſapiens debet eſſe rex, ſed et miſericors, ut cum ſapientia miſericorditer ſit juſtus, &c. Quibus tamen et qualiter eſt miſerendum, doceant eum merita vel immerita perſonarum, &c.* Bract. lib. 2. fo. Of this royall vertue we ſhall ſpeak the more willingly, for that (as it hath appeared before in the chapter of Sanctuary) all ſanctuaries and places of refuge for ſafegard of life are taken away. And where Bracton in the ſame place ſpeaking of the kings mercy ſaith, *Nihil tam proprium eſt imperii quam legibus vivere*, it is to be obſerved, that the lawes of this realm have in ſome ſort limited and bounded the kings mercy, as ſhall appear hereafter. And for as much as his mercy is conveyed unto his ſubjects by his pardons, we ſhall now ſpeak thereof, being led thereunto by the book in 9 E. 4. where it is holden *a chefcun roy appent per reaſon de ſon office a faire juſtice et grace; juſtice in execution des leyes, &c. et grace de granter pardons, &c.* 9 E. 4. 2. a.

[a] A pardon is a work of mercy, whereby the king either before attainder, ſentence, or conviction, or after, forgiveth any crime, offence, puniſhment, execution, right, title, debt or duty, temporall or eccleſiaſticall: [b] all that is forfeited to the king by any attainder, &c. he may reſtore by his charter: but if by the attainder the blood be corrupted, that muſt be reſtored by authority of parliament.

We call it in Latin *perdonatio*, and derive it *à per et dono: per* is a prepoſition, and in the Saxon tongue is *for*, or *vor*: as to forgive is throughly to remit, and * forethink is to repent, and forbear is to bear with patience, as it is ſaid, *leve eſt ferre, perferre grave.*

[c] All pardons of treaſon or felony are to be made by the king, and in his name only, and are either generall or ſpeciall. All pardons either generall or ſpeciall, are either by act of parliament (whereof the court in ſome caſes ſhall take notice) or by the charter of the king, (which muſt always be pleaded.) And theſe againe are either abſolute, or under condition, exception, or qualification: for ſome of thoſe pardons laſt mentioned the party may have a writ of allowance, or take an averment in certain caſes, in others the party may be aided by averment only, where no writ of allowance doth lie.

And firſt of generall pardons. Generall pardons are by act of parliament, if any of theſe pardons be generall and abſolute, the court

[a] Seneca, lib. de Clementia, ca. 24. Remiſſius imperanti melius paretur.

[b] See the firſt part of the Inſt. ſect. 1. fo. 8. and ſect. 646, 647. See after cap. Reſtitution.

* Rot. par. 17 R. 2. nu. 11. &c.

[c] 27 H. 8. cap. 4. Hil. 29 E. 1. coram rege Heref. Jo. fil. Philippi Perpoint. 1 H. 4. fo. 37. 17 H. 6. protect. 57.

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11 H. 4. fo. 41. 28 H. 8. Dier 28. 3 Mar. ibid. 200. 26 H. 8.

court must take notice of them, though the party plead it not, but would wave the same. But in these dayes the generall pardons have so many qualifications and exceptions of offences and things, and of persons also, that the court cannot take notice of them, neither can the party take benefit or advantage thereof, unless he plead it: and for that it may concern the safety and quiet of many a subject, we have expressed the form of the pleading of a generall pardon, and have it set down here in Latin: but if the offence be objected in the star-chamber, or any other English court, then it must be pleaded in English.

fo. 7. There is a very generall and absolute pardon. Ro. par. 15 H. 6. nu. 31. 33 H. 6. nu. 29. &c.

Et præd. A. per B. attornatum suum venit, &c. (or *in propria persona*) *et dicit quod dominus Jacobus rex nunc ipsum A. occasione præmissa impetere seu occasionare non debet: quia dicit, quòd per quendam actum in parliamento dicti domini regis nunc tent' apud Westm' in com' Midd' nonò die Februarii anno regni sui septimo, inter alia, inactitat' et stabilitum exist it authoritate ejusdem parliamenti, * quòd omnes et singuli subditi dicti domini regis tam spirituales, quam temporales hujus regni Angliæ, Walliæ, insularum Jernsey, et Garnsey, et villæ Barwic, hæredes, successores, executores, et administratores sui, et eorum quilibet, ac omnia et singula corpora aliquo modo corporata, civitat', burgi, comitat', riding, hundred, lath, rape, wapentag', vil', villat', hamlet' et tithing, et eorum quilibet, ac successor, et successores eorum, et cujuslibet eorum authoritate ejusdem parliamenti acquietarentur, perdonarentur, relaxarentur, et exonerarentur versus dictum dominum regem, hæredes et successores suos et quemlibet eorum de omnibus proditionibus, feloniis, offensis, contempt', transgress', intrationibus, injuriis, deceptionibus, malegesturis, forisfacturis, penalitatibus, et summis pecuniæ, pœnis mortis, pœnis corporalibus, et pecuniariis, et generaliter de omnibus aliis rebus, causis, querelis, sectis, judiciis et executionibus in prædicto actu non exceptis, neque forpris', quæ per ipsum dominum regem aliquo modo seu per aliquem modum perdonari potuerunt ante et usque nonum diem Novembris tunc ultim' præterit' ante editionem actus prædicti, cuilibet, aut alicui suorum subditorum, corporum corporat', civitat', burgorum, comitat', riding, hundred, lath, raparum, wapentag', villæ, villat', et tithing, vel aliquorum aliorum prout in actu prædicto plenius continetur. Et idem A. dicit quòd * offensa prædicta versus ipsum in forma prædicta objecta non est in actu prædicto excepta, neque forprisata. Et quòd ipse est et tempore editionis actus prædicti fuit subditus et ligeus dicti domini regis nunc natus sub obedientia sua, videlicet apud Westm' prædict', quodque ipse non est aliqua persona in actu prædict' except' neque forprisat'. Et hoc paratus est verificare, unde non intendit quòd dictus dominus rex nunc ipsum A. occasione præmissa impetere seu occasionare velit, unde petit judicium. Et quòd ipse de præmissis prædict' exoneraretur, et quòd generalis pardonatio prædicta ei allocatur, &c.* See before cap. of Falsifying of Attainders.

* This is put but for an example, but care must be taken, that what generall pardon soever be pleaded the first clause of the pardon of discharge, &c. be truly alledged. For the exposition of generall words, see L. 5. fo. 47. Littletons case. Ibid. fo. 46. Franklyns case. Ibid. fo. 48. Drywoods case. Ibidem 49. b. Wirrals case. Li. 6 fo. 79, 80. Sir Edw. Fittons case. Li. 6. f. 13. b. Li. Keylw. 8 H. 8. 187. ibid. 10 H. 8. fo. 198. a. ter.

* These averments (as you perceive) may be taken without any writ of allowance. 8 E. 4. 3. 4 H. 7. 8. Li. 8. fo. 68. Trollops case. Vid. l. 6. fo. 13, 14. in Arundels case. A case of Burton.

By the generall pardon of 28 El. all felonies are pardoned, burglary excepted. Hil. 29 El. it was resolved by all the justices, that a man being attainted of burglary was excepted, for the burglary remains, and is made more apparant by the attainder, and the offence of burglary is the foundation.

Hil. 29 El. the resolution of all the justices.

The most beneficiall generall pardons for the subject were those of the fift, and thirteenth years of the reign of queen Elizabeth, as by comparison of those with others, will to the judicious reader easily appear. The best generall pardon in all king James time, was that of the 21 year of his reign, as by comparison of that with

with any of his former, will evidently appear, and were too long here to be rehearſed.

And now of particular pardons. No particular pardon, be it at the coronation, or any other, of any offence or offences whatſoever, that is abſolute without any * condition, &c. need any writ of allowance, but when the pardon is conditional by force of the act of 10 E. 3. cap. 2. there a writ of allowance out of the chancery teſtifying that the condition is performed, viz. ſurety found according to that act may be had, or the party may plead the finding of ſurety, &c. and vouch the record.

Hil. 26 E. 3. Coram rege rot. 21. Wilteſ. 3 H. 7. 7. a. this ſtatute expounded, and this act extend to felony, and not to treaſon. Rot. pat. 21 Julii anno 1 R. 2. Rot. par. 12 Feb. 21 H. 8. great offences need great pardons, little offences are ſoon forgiven. Hil. 29 E. 1. Coram rege Hereford. Johannes fil. Ph. Perpoint, &c.

The moſt large and beneficiall pardons by letters patents, that we have read, and doe remember, were that to William Wickham biſhop of Wincheſter (for good men will never refuſe God and the kings pardon, becauſe every man doth often offend both of them) and that other to Thomas Woolſey cardinall, which are learnedly and largely penned.

But let us turn our eye to ancient charters of pardon, and conſider well of them.

*Edwardus Dei gratia rex Angliæ, dominus Hiberniæ, et dux Aquit', omnibus balivis et fidelibus ſuis, ad quos preſentes lræ. pervenerint, ſalutem. Sciatis quòd pro bono ſervitio quod Johannes Chaumprona de Thornton in Pickerings, in partibus Scotiæ nobis impendit, perdonavimus ei ſectam pacis noſtræ, quæ ad nos pertinet * pro morte Iſabellæ, quondam uxoris ſuæ, unde indictatus eſt, et firmam pacem noſtram ei inde concedimus. Ita tamen quod ſtet recto, ſi quis verſus eum inde loqui voluerit. In cuius rei teſtimonium has literas noſtras fieri fecimus patentes. Teſte me ipſo apud Roukeſburge, nono die Febr. anno regni noſtri triceſimo.*

* It appeareth by the record that he killed her per infortunium.

Edwardus Dei gratia rex Angliæ, dominus Hiberniæ, et dux Aquitan', omnibus balivis et fidelibus ſuis, ad quos præſentes literæ pervenerint, ſalutem. Sciatis quod pro bono ſervitio quod Galf. filius Warnum in partibus Scotiæ impend't, perdonavimus eidem Galfro. ſectam pacis noſtræ quæ ad nos pertinet, de homicidiis, roberiis, latrociniis, fractionibus domorum, feloniis et aliis tranſgreſſionibus contra pacem hram. in regno nro. factis, unde indictatus eſt, et ſimiliter tranſgreſſionem quam fecit ab eccleſia de Watford, in quia aliquantdiu pro timore inimicorum ſuorum ſe tenuit fugiendo, et ſe ſecundum legem et conſuetudinem regni noſtri juſticiar' non permittendo, et etiam utlagariam, ſi qua in ipſum ea occaſione fuerit promulgata, et firmam pacem noſtram ei inde concedimus. Ita tamen quod ſtet recto in curia noſtra, ſi quis verſus eum loqui voluerit de homicidiis, roberiis, latrociniis, fractionibus, feloniis et tranſgreſſionibus prædictis. In cujus rei teſtimonium has literas noſtras fieri fecimus patentes. Teſte me ipſo apud Linũſcu viceſimo ſecundo die Januarii anno regni noſtri triceſimo, per breve de privato ſigillo.

Delib. paolæ de Windeſſore, coram Hugone de Braund, et Johanne Neprunt die Jovis proxim' poſt clauſ. Paſc. anno 25 E. 1.

It appeareth by this record, that the ſaid Jeffry was indicted for the death of a man, and of divers burglaries and felonies, and being thereupon arraigned prayed his clergy, *ſed ſalvo ſibi privilegio clericali poſuit ſe ſuper patriam*, and was found not guilty, &c. in the proceeding whereof there was manifeſt error, and obtained the ſaid pardon. Herein divers things are obſervable: firſt, that the pardon is *de* * *homicidiis*, and not *de murdris*, neither have we ſeen any pardon of murder by any king of England by expreſſe name. Secondly, by theſe ancient words the king doth pardon *ſectam pacis noſtræ, quæ ad nos pertinet de homicidiis, &c. et firmam pacem noſtram ei*

* For this word homicide, ſee in the chapter of Murder. See Hil. 31 E. 3. Coram rege rot. 7. Northumb. 9 E. 4. 28.

ei inde concedimus. This *ſecta pacis* is by indictment, which is the kings ſuit, and, as it were, his declaration. Thirdly, that the king of ancient time did not pardon *homicidium, &c.* but *ſectam pacis noſtræ quæ ad nos pertinet de homicidiis, &c.* yet when he pardoned, and releaſed the ſuit or mean, viz. *ſectam pacis, &c.* the offender was diſcharged of the homicide it ſelf, *in diebus illis,* but at this day the offence it ſelf is pardoned, which is the ſureſt way.

8 H. 4. fo. 22. Li. 6. fo. 13. b.

34 H. 6. 3. a. 35 H. 6. 1. a. 11 H. 7. 10. Li. 6. f. 79. l. 8. 68. Lib. Keylw. 8 H. 8. fo. 187. 2 R. 2. 4. b. ſimile.

The king brought an action of debt upon an obligation, the defendant pleaded *non eſt factum,* and at a *niſi prius* it was found the deed of the defendant; and before the day in bank the king pardoned the defendant all debts, querels, &c. and after the king had judgement, and ſued out execution, and the defendant came and pleaded the pardon, and it was adjudged that in the kings caſe, he might plead the ſame, though he had no day in court, becauſe he could not have an *audita querela,* or a *ſcire fac'* againſt the king, and therefore if he could not plead it, he ſhould be without remedy, but againſt a common perſon he could not plead it, becauſe he ought to have an *audita querela,* or a *ſcire fac'.* And in this caſe it is obſervable, that albeit by the judgement a new title to the ſaid debt is accrewed to the king of record after the pardon, the obligation at the time of the pardon being but a matter in fact, yet for that the obligation was the * foundation of the debt, and the matter whereupon judgement was given, and by the pardon the debt due by the obligation was extinct, the judgement thereupon cannot bind, but is to be avoided by pleading the pardon.

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* Pl. com. f. 401. Coles caſe. 37 H. 6. fo. 21. Quatermains caſe. Li. 5. fo. 49. Vaughans caſe. Li. 6. fo. 13. *Caſes de pardon.* 20 El. Dier 135. Exod. 21. 12, 13, 14. Deut. 19. 13. *Non miſereberis ejus, &c.*

What things the king may pardon, and in what manner, and what he cannot pardon, falleth now to be treated of.

[a] In caſe of death of man, robberies, and felonies againſt the peace, divers acts of parliament have reſtrained the power of granting charters of pardons. Firſt, that no ſuch charters ſhall be granted but in caſe where the king may doe it by his oath. [b] Secondly, that no man ſhall obtain charters out of parliament, and accordingly in a parliament roll it is ſaid; [for the peace of the land it would much help, if good juſtices were appointed in every county, if ſuch be let to mainprize doe put in good ſureties, as eſquires or gent. and that no pardon were granted but by parliament.] Thirdly, for that the king hath granted pardons of felonies upon falſe ſuggeſtions, [c] it is provided, that every charter of felony which ſhall be granted at the ſuggeſtion of any, the name of him that maketh the ſuggeſtion ſhall be compriſed in the charter, and if the ſuggeſtion be found untrue, the charter ſhall be diſallowed. And the like proviſion is made by the ſtatute of 5 H. 4. cap. 2. for the pardon of an approver.

[a] 2 E. 3. c. 2. 14 E. 3. ca. 14. 10 E. 3. ca. 2.
[b] 2 E. 3. c. 2. 4 E. 3. ca. 13. Rot. Par. 13 E. 3. nu. 10.
[c] 27 E. 3. c. 2. Trin. 30 E. 1. Rot. 2. coram rege London, anno 29 E. 1. A pardon of death, ad inſtantiam Johan. Butecourt. Mich. 33 E. 1. coram rege Ro. 65. a pardon ad requiſitionem H. de Bohun, count. Heref. & Eſſex.

[d] Fourthly, it is provided that no charter of pardon for murder, treaſon, or rape, ſhall be allowed, &c. if they be not ſpecified in the ſame charter.

[d] 13 R. 2. ſta. 2. c. 1. 16 R. 2. ca. 6. 9 E. 4. fo. 26. b.

Before this ſtatute of 13 R. 2. by the pardon * of all felonies, *treaſon was pardoned, and ſo was murder, &c.* [f] At this day by *the pardon of all felonies, the death of man is not pardoned.* Theſe be excellent laws for direction, and for the peace of the realm. [g] But it hath been conceived, (which we will not queſtion) that the king may diſpenſe with theſe laws by a *non obſtante,* be it generall or ſpeciall, (albeit we find not any ſuch clauſes of *non obſtante,* to diſpenſe with any of theſe ſtatutes, but of late times) theſe

[e] 1 E. 3. f. 24.
[f] 8 H. 6. 20. 4 E. 4. fo. 10.
[g] Li. 6. fo. 15. 9 E. 4. 26. b. per Billing chief juſtice.

theſe ſtatutes are excellent inſtructions for a religious and prudent king to follow, for in theſe caſes, *ut ſummæ poteſtatis regis eſt poſſe quantum velit, ſic magnitudinis eſt velle quantum poſſit.* Hereof you may read more in juſtice Stanford, lib. 2. cap. 35. in divers places of that chapter, of his grave advice in that behalf. Moſt certain it is, that the word of God hath ſet down this undiſputable generall rule, [h] *Quia non profertur cito contra malos ſententia, filii hominum ſine timore ullo perpetrant mala.* And thereupon the rule of law is grounded. [i] *Spes impunitatis continuum affectum tribuit delinquendi. Et veniæ facilitas incentivum eſt delinquendi.* This is to be added, that the intention of the ſaid act of 13 R. 2. was not that the king ſhould grant a pardon of murder by expreſſe name in the charter, but becauſe the whole parliament conceived, that he would never pardon murder by ſpeciall name for the cauſes aforeſaid, therefore was that proviſion made, which was (as in other caſes I have obſerved) grounded upon the law of God, *Quicunque effuderit humanum ſanguinem, fundetur ſanguis illius; ad imaginem quippe Dei creatus eſt homo. Nec aliter expiari poteſt, niſi per ejus ſanguinem, qui alterius ſanguinem effuderit.* And the words of every pardon is after the recitall of the offence, *Nos pietate moti, &c.* See before in the chapter of Murder, and in the ſecond part of the Inſtitutes, ſtat. de Glouc. ca. 9. and the Regiſter, fo. 309. pardon of the king, *de morte per infortunium, ſe defendendo, vel per lunaticum, vel per furioſum.*

[h] Eccleſ. 8. 11.

[i] Regulæ. Maledictus eſt qui peccat ſub ſpe.

Geneſ. 9. 6. Num. 35. 33.

By the ancient and conſtant rule of law, *Non poterit rex gratiam facere cum injuria et damno aliorum; quod autem alienum eſt, dare non poteſt per ſuam gratiam.*

Bract. l. 3. f. 132.

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In an appeal of death, robbery, rape, &c. the king cannot pardon the defendant, for the appeal is the ſuit of the party, to have revenge by death: and whether the defendant be attainted by judgment, &c. or by outlawry, the pardon of the king ſhall not diſcharge the defendant. * In an appeal, the defendant wages battail, the plaintif counterpleads, for that the defendant brake priſon, if the king pardon the breaking of priſon, the counterplea fails: note the breaking priſon is a collateral act: and yet in divers caſes at the only ſuit of the party, when the defendant either by the common law, or by any ſtatute (beſides the reſtitution, or dammage of the plaintif) is thereby alſo to have an exemplary punniſhment, the king may pardon the ſame. For example, in an attaint by A. againſt the party, and the petit jury; againſt the party to have reſtitution, this the king cannot pardon: againſt the petit jury, by the common law that they ſhould loſe *liberam legem*, their wives and children caſt out of their houſes, their houſes waſted, their trees proſtrated, their meadows ploughed up, their goods and chattels ſeiſed, and their bodies taken, this the king may pardon, becauſe it is a puniſhment exemplary to deter others, and tendeth not to the reſtitution or ſatisfaction of the plaintif.

11 R. 2. Chre. 17. 2 R. 3. fo. 8. See 4 Mariæ Dier 133.

* 2 E. 3. Cor. 134.

13 E. 4. 5. a.

Now to take an example upon a ſtatute: *De pueris maſculis ſive fœmellis (quorum maritagium ad aliquem pertineat) raptis et abductis, ſi ille qui rapuit non habens jus in maritagio, licet poſtmodum reſtituat puerum non maritatum, vel de maritagio, ſatisfecerit, puniatur tamen pro tranſgreſſione per priſonam duorum annorum.* In this caſe the party being ſatisfied, the king may pardon the impriſonment by two

W. 2. ca. 35. anno 13 E. 1.

years, for that was added as a puniſhment exemplary, *puniatur*, &c. And this doth notably appear by a charter of pardon which king E. 2. made after this ſtatute. *Rex de gratia ſua ſpeciali perdonavit Godithæ, quæ fuit uxor Roberti de Waldiſch, id quod ad ipſum pertinet, de tranſgreſſione quam ipſa Goditha fecit Agathæ, quæ fuit uxor Johannis de Waldiſch de Ellam, rapiendo et abducendo Johannem fil' et hæredem Johannis de Waldiſch infra ætatem exiſtentem, cujus maritag' ad ipſam Agatham pertin', unde ipſa Goditha coram domino E. quondam rege Angliæ patre ipſius regis convicta fuit, et per conſideracionem cur' dicti patris priſonæ adjudicata per biennium ibidem moratura, et etiam tempus impriſonamenti quod adhuc reſtat de biennio prædicto. Ideo vult idem rex quod præfata Goditha * de eo quod ad ipſum pertinet pro tranſgreſſione prædicta ſit quieta, et quòd à priſona prædicta, ſi pro eo quod ad ipſum regem inde pertinet, et non alia de cauſa detineatur in eadem, deliberetur. Teſte rege apud Weſtm' 8. die Maii anno regni ſui primo. Ideo ipſa Goditha inde quieta quoad hoc, quod ad dominum regem inde pertinet, &c.*

Paſch. 34 E. 1. Coram rege Rot. 30 Kanc. in Raviſhment de gard.

See the firſt part of the Inſtitutes. W. 2. ca. 35.

* Nota de eo quod ad regem pertinet.

Anno 1 E. 2.

See more of this matter, 3 El. Dier 201, 202. 9 El. Dier 261, Muſgraves caſe. 16 El. Dier 323, Taverners caſe.

Trin. 40 El. Coram rege in appeal de murdro. Inter Shugborough & Buggins. Li. 5. fo. 50. & 110. b. 15 H. 7. 9. 4 H. 7. ca. 13.

The defendant in an appeal of murder upon not guilty pleaded, was found guilty of manſlaughter: and it was reſolved by the juſtices upon conference between them, that the queen might pardon the burning of the hand, for that is no part of the judgement at the ſuit of the party plaintif in the appeal, but it is a collaterall, and exemplary puniſhment inflicted by the ſtatute of 4 H. 7. cap. 13.

3 E. 3. Aſſ. 445. 16 E. 3. Grant. 53. 35 H. 6. 29. per Forteſcue. 37 H. 6. 4. b. Pl. com. 487. in Nichols caſe.

In ſome actions wherein the ſubject is ſole party (as appeareth by that which hath been ſaid) ſome things the king may pardon: ſo on the other ſide, where the king is ſole party, yet ſome things there be, that he cannot pardon. As for example; for all common nuſances, as for not repairing of bridges, high-ways, &c. the ſuit (for avoiding of multiplicity of ſuits, which the laws abhorre, and that *nulli magis tueri rempublicam creditum eſt quam regi)* is given to the king only, for redreſſe, and reformation thereof, but the king cannot pardon, or diſcharge either the nuſance, or the ſuit for the ſame; for, as Bracton ſaith, *Non poterit rex gratiam facere cum injuria et damno aliorum.* See Glanvill li. 7. cap. 17. verſ. finem.

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4 E. 4. fo. 4. 12.

The cuſtomer albeit the bond and ſurety be made to him for the importing of bullion according to the ſtatute of 14 E. 3. cap. 1. yet cannot he releaſe it, *quia pro bono publico.* If one be bound in a recogniſance, &c. to the king to keep the peace againſt another by name, and generally all other lieges of the king; in this caſe, before the peace be broken, the king cannot pardon or releaſe the recogniſance, although it be made onely to him, becauſe it is for the benefit and ſafety of his ſubjects.

11 H. 4. 43. 37 H. 6. 4. b. 1 H. 7. 10. b.

1 H. 7. 3. 37 H. 6. 4. See before ca. 88. Againſt vexatious relators, &c. in fine. * 3 H. 8. c. 12. &c.

After an action popular be brought, *tam pro domino rege, quàm pro ſeipſo*, according to any ſtatute, the king cannot diſcharge but his own part, and cannot diſcharge the informers part, becauſe by the bringing of the action he hath an intereſt therein: but before action brought, the king may diſcharge the whole, (* unleſſe it be provided to the contrary by the act) becauſe the informer cannot bring an action or information originally for his part only, but muſt pur-

ſue

ſue the ſtatute: and if the action be given to the party grieved, the king cannot diſcharge the ſame.

All ſuits in the ſtar-chamber, though exhibited by the party, are informations for the king, and the king may pardon them, but after judgement (and dammages, if any be given) and coſts taxed, the king cannot pardon them. Lib. 5. fo. 50. Buggins caſe. Eodem li. fo. 51. Hals caſe.

[a] And that party which informeth not the king truly, is not worthy of his grace and forgiveneſſe, and therefore either *ſuppreſſio veri*, or *expreſſio falſi* doth avoid the pardon. [a] Prov. 20. 28. Miſericordia et veritas cuſtodiunt regem.

[b] A man commits felony, and is attainted thereof, or is abjured for the ſame, the king pardoneth him the felony without any mention of the attainder, or abjuration, the pardon is void. [c] But if a man be attainted of burglary, and by the generall pardon all felonies, &c. are pardoned (except all burglaries) the attainder and burglary be excepted, as before is ſaid. [b] 9 E. 4. 28. 19 E. 3. Cor. 124. 6 E. 4. 4. per Cheke. 11 H. 4. 16. [c] Lib. 6. fo. 13.

The king pardoneth to A. a felony whereof he ſtandeth indicted, or indicted and attainted, &c. and in truth he is not indicted, nor attainted, &c. this is *expreſſio falſi*, and maketh the pardon void. A is outlawed, and the king pardons him the outlawry, and all his goods; it is void for the goods, for he muſt have a grant of them. F. N. B. 225. c. 9 H. 5. 14, 15.

If a man be indicted of felony, and the king reciteth the ſame, and pardoneth the felony contained in the indictment, and all outlawries thereupon, if any be, this is a good pardon of the outlawry, though it be doubtfully alledged, and the king not certainly informed.

The king may pardon one convict of hereſie, or of any other offence puniſhable by the eccleſiaſticall law. In all proceedings in the eccleſiaſtical court *ex officio*, the king may pardon the offence. The king may alſo pardon piracy upon the ſea; but by what word, and in what manner, ſee before in the chapter of piracy. F. N. B. 269. 20 El. Dier, 135. Li. 6. fo. 13, 14. Li. 5. fo. 51. Hals caſe. Regiſt. 67.

All the juſtices of England being aſſembled at Serjeants Inne in Fleetſtreet, when I ſerved queen Eliz. as her attorney generall, I moved this caſe unto them. A man ſeiſed in fee of two mannors, the one holden of the queen by knight ſervice *in capite*, and the other holden of a common perſon, alieneth both, and the alienee ſueth out a pardon for both, in which pardon the words are, *quæ de nobis tenentur in capite per ſervic' militare, ut dicitur*, and after this pardon being tranſcripted into the exchequer, proceſſe goeth out againſt the alienee, who pleadeth the pardon, beginning his plea thus, *Quibus lectis & auditis idem A. queritur ſe colore præmiſſorum graviter vexatum et inquietat' fore, et hoc minus juſte: quia dicit quod eadem domina regina per literas ſuas patentes, &c.* and plead the letters patents of pardon, as they be with the ſaid clauſe of *ut dicitur*, and after he alieneth the manor which *in rei veritate*, was not holden: the queſtion was, whether the ſecond alienee may plead the truth of the matter or ought to be concluded by the pardon and plea of the firſt alienee. And firſt the juſtices had conſideration of the books in 29 Aſſ. pl. 38. 46 E. 3. 33. Pl. com. 398. 7 E. 6. tit. Eſtoppel. Br. 222. And in the end it was reſolved by all the juſtices, that the pleading of the pardon or of a licenſe, as it is, is no concluſion for no more then the pardon or licenſe being not poſitive or affirmative, but *(ut dicitur)* is a concluſion; no more is the Mic. 37 & 40 El. Reſolution of the juſtices concerning pardons and licences of alienation and the pleading of them, &c. 29 Aſſ. pl. 38. 46 E. 3. 33. Pl. com. 398. 7 E. 6. tit. Eſtop. Br. 222.

the pleading of them with the clauſe of *(ut dicitur)* any concluſion. And concluſions ſhall not be wrought by inference or implication of a thing that is not directly alledged. But if the pardon or licenſe had been affirmative and direct without the clauſe, *ut dicitur*, it had been a concluſion, and ſo had the pleading thereof been alſo. Laſtly, it was reſolved, that in caſe of the pardon or licenſe with the clauſe, *ut dicitur*; if the party confeſſe the tenure that plead the ſame: as to ſay, *bene et verum eſt*, that the land is holden by knights ſervice *in capite*, and plead the pardon or licenſe, this ſhall conclude: and ſome of the barons ſaid, that according to theſe reſolutions it hath been uſed in the exchequer, and many preſidents be there accordingly: and by theſe reſolutions the books aboveſaid ſhall the better be underſtood.

34 H. 6. 3. 21 E. 4. 46. 2 R. 3. 4. lib. 5. fo. 56.

If the king releaſe to A all debts, and in truth A and B be indebted, this ſhall not diſcharge B: but otherwiſe it is in the caſe of a ſubject, for in that caſe the releaſe to one diſchargeth both.

If one be indebted to the king, if the king pardon or releaſe the debt, the action and ſuit for the debt is diſcharged, and if he pardon or releaſe the action and ſuit, the debt is diſcharged: and ſo it is in both theſe caſes in the caſe of a ſubject.

22 Aſſ. pl. 37.

A man is indicted of treſpaſſe and outlawed at the ſuit of the king. *Rex pardonavit utlegariam in eum promulgat', et quicquid ad eum pertinet*, and notwithſtanding the defendant ſhall make fine, for it ſeemeth that theſe words, *quicquid ad eum pertinet*, without any reference, are too generall to diſpenſe with the fine.

We finde alſo a diſcharge of further proceeding directed to the judges of the court, &c. (not by any pardon of the offence) but by the kings acknowledgement under the great ſeale of the parties innocency, with commandement to the judges, that in the former proceedings and proces, &c. they ſhall altogether ſurceaſe: whereupon the court will award that the party ſhall go *ſine die*, and that there ſhall be no further proceeding againſt him: as taking one example for many.

Paſch. 4 E. 3. Coram rege. rot. 38.

William de Melton archbiſhop of York was accuſed in the kings bench *coram rege et concilio ſuo*, in *anno* 3 E. 3. for adherency to Edmond earle of Kent in his treaſons, whereunto the archbiſhop pleaded not guilty; and after two writs of *venire fac.* awarded, the king directed his writ under the great ſeal to the judges of the kings bench, to this effect. *Licet venerabilis pater Willielmus archiepiſcopus Eborum, et Stephanus London epiſcopus, per diverſa br'ia noſtra coram nobis ad ſectam noſtram implacitentur de eo quod ipſi Edmundo nuper comiti Kantiæ adhæſiſſe debuerant: quia tamen prædict. archiepiſcopus et epiſcopus de adhæſione predict. omnino immunes reputamus: vobis mandamus, quod placitis prædictis coram nobis ulterius tenen' omnino ſuperſedeatis. Teſte me ipſo apud Weſtm. 12 die Decembr. anno regni noſtri 4.* The award of the court that is given thereupon, is very obſervable, *viz. Cujus brevis prætextu, conſideratum eſt, quod prædict. archiepiſcopus eat inde ſine die, &c. Et ulterius non procedatur verſus eum.*

Paſch. 4 E. 3. Coram rege. rot. 53.

Stephen Graveſend biſhop of London was charged with the ſame offence in parliament, *anno* 3 E. 3. whence by order of parliament the matter was referred to the kings bench to be tried, where he pleaded not guilty; and after was diſcharged *ut ſupra*, by the ſame writ. Theſe men (it may be) thought that the taking of the pardon

ſhould be an implyed confeſſion of the fault, and therefore went a new way: but no man that is wiſe and well adviſed will refuſe God and the kings pardon how often ſo ever he may have it; for there is no man but offendeth God and the king almoſt every day, and the pardon is the ſafeſt and ſureſt way.

If a man be indicted of felony, and found guilty, and being in priſon the king may under the great ſeale reciting the offence, &c. retain him to ſerve in his wars on this ſide or beyond the ſeas: this charter he may plead, and the court ought to allow it. As for example: *Quidam indictatus de felonia, et inde culp. dicit quòd rex eum conduxit, et inde producit cartam, quòd rex eum conduxit in vaſc. in exercitu, et dicta carta allocata fuit per curiam.* But a protection lyeth not in that caſe: becauſe a protection is a formed writ, and cannot have ſuch a recitall of the truth of the caſe: and [a] writs of protection lye not in caſe of felony, nor is it to be allowed to any that is priſoner to the court.

Paſch. 22 E. 3. tit. cor. 239. Coram rege. [240]

[a] 7 E. 4. 29. a acc' 30 H. 6. 3. See the firſt part of the Inſtitutes. ſect. 199.

[b] One indicted of felony, without any learned councell, ſhewed forth a charter of pardon which was diſcordant to the indictment, and alſo to his name; and becauſe the court perceived that it was the kings meaning he ſhould be pardoned, he was remanded to get a better pardon.

[b] 26 Aſſ. p. 46.

[c] What things be requiſite to a pardon of outlawry, ſee the ſtatute of 5 E. 3. cap. 12.

[c] 5 E. 3. cap. 12.

[d] When the parties defendants appeared to the court to be poore, and were to be amerced or fined, the entry of ancient time was, *perdonantur per juſtic' quia pauperes.*

[d] Paſch. 8 E. 1. in banco Rot. 79. Abbas de Burton, &c.

[e] It is obſerved that repeals by parliament of pardons lawfully and duly obtained, have been ſeeds of great diſcontentment, and of evill event.

[e] Vid. Rot. Parl. 21 R. 2. nu. 12, 13, &c.

[f] Generall pardons have been often granted at the petition of the commons, for they know beſt, where the ſhooe wringeth them, and wherein, and how they are to be eaſed.

[f] 36 E. 3. ca. ult. 4 R. 2. nu. 30, 31, 32. 1 H. 4. ca. 20. 2 H. 4. ca. 13. 5 H. 4 ca. 15. 4 H. 5. cap. 8. a ſhort and effectuall pardon, and many others.

So odious was perjury, that by the law of God it was not to be pardoned: *Non miſereberis ejus, &c.*

Deut. 9. 21.

CAP. CVI.

OF RESTITUTIONS.

THERE is another work of grace and mercy, that is, when any man or woman being attainted of high treaſon, petit treaſon, or felony, (whereby the blood is corrupted, &c.) or his or her heir is reſtored.

And ſeeing we have formerly ſpoken how far, and to what intent in thoſe caſes, the king of his grace may by his charter of pardon reſtore the party: we ſhall now treat of the reſtitution of the delinquent, or of his or her heirs by parliament. Attainders ought to be had upon plain and direct evidence, (as before is ſaid) for if the party be executed, reſtitution may be had of his lands, &c.

See the firſt part of the Inſtitutes, ſect. 1. fo. 8. a. & 646, 647. 745. Vid. cap. Pardon. fol. 233.

&c. but not of his life. Generally, *Reſtituere nihil aliud eſt, quam* * *in priſtinum ſtatum reducere.*

* Gen. 40. 13. Job 12. 23. 42. 10. Reſtitutio ſecundum quid, ſeu in partem. Reſtitutio in integrum.

Of reſtitutions by parliament ſome be in blood only, (that is to make his reſort as heir in blood to the party attainted and other his anceſtors, and not to any dignity, inheritance of lands, &c.) and this is a reſtitution *ſecundum quid*, or in part. And ſome be generall reſtitutions, to blood, honours, dignities, inheritance, and all that was loſt by the attainder: and that is *reſtitutio in integrum*, with an addition ſometimes, that it ſhall be lawfull for the party reſtored and his heirs, to enter, &c. Of the firſt you may reade in Dier 10 Eliz. fo. 274. in Petition: and Rot. Par. 23 Eliz. of the earl of Arundel, &c. Of the ſecond you may reade 15 E. 3. tit. Petition 2. 3 H. 7. fo. 15. a. 10 H. 7. 22, 23. pl. com. fo. 175. Rot. Par. 13 H. 4. nu. 20, &c. Of both of them you may reade plentifully in our books, and parliament rolls, and in divers of them with addition of entry. See 1 H. 8. Kelw. 154. Sir William Oldehalls caſe, 4 H. 7. 7. Lo. Ormonds caſe. Rot. Parl. 11 H. 4. nu. 42. Rich. de Haſtings caſe, and Rot. Parl. 14 E. 4. nu. 4. Sir Joh. Forteſcues caſe, attainted of treaſon in 1 E. 4. &c.

Brit. ca. 13. fo. 23. 10 Eliz. Dier 274.

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And the reaſon wherefore the king may by his charter pardon the execution, and reſtore the party or his heirs to the lands forfeited by the attainder, and remaining in the crown is, for that no perſon hath thereby any prejudice; but to make * reſtitution of his blood he cannot do it, but by act of parliament, becauſe it ſhould be to the prejudice of others.

3 E. 6. tit. Reſtitution. Br. 37. See the firſt part of the Inſtitutes. ſect. 646, 647. 745. fo. 392. verb. *Le ſank eſt corrupt, &c.*

In cartis benigna facienda eſt interpretatio, in fundationibus donuum religioſarum, hoſpitalium, et aliorum operum charitatis benignior, in teſtamentis magis benigna, in reſtitutionibus benigniſſima. [a] For it is holden in our books, that in reſtitutions the king himſelf hath no favour, nor his prerogative any exemption, but the party reſtored is favoured.

[a] See 10 El. Dier ubi ſup. 41 E. 3. 5. b. 27 Aſſ. p. 48. 17 E. 3. 40. 5 E. 3. 66. 29 E. 3. 7. 20 Eliz. Dier 360. Pl. Com. 252. a. 16 E. 3. Livery 30. 44 E. 3. 45. 18 E. 3. 21, 22. 24 E. 3. 29. 40 E. 3. grant 50.

[b] king H. 3. was intitled, &c. to the lands of William de Albo Monaſterio by his attainder, and granted the ſame to Robert de Mares and his heirs, *donec eas reddiderit rectis hæredibus per voluntatem ſuam, vel per pacem.* And albeit at the making of this grant William de Albo Monaſterio (being dead) could have in reſpect of the attainder and corruption of blood no right heir; yet becauſe it was to make reſtitution, it had a moſt benigne interpretation.

[b] Mich. 8 E. 1. in Banco. Rot. 62. Norff. Rot. Par. anno 4 E. 3. nu. 18. on the backſide of the roll.

[c] William Lo. Zouche of Mortimer and Elianor his wife prayed to be reſtored to their land of Glannor and Morgannon in Wales, the mannor of Haveley in the county of Worceſter, the mannor of Teukeſbury in the county of Gloceſter, being the inheritance of the ſaid Elianor: who by the extort means of Roger late earle of March, were inforced to paſſe the ſame to the king by fine, in conſideration of ten thouſand pounds the king reſtored them thereto as in their former eſtate.

* An example of reſtitution in blood only. 11 H. 4. nu. 42. 13 H. 4. nu. 19, 20.

* Henry Courtney marquiſſe of Exeter and earl of Devon, having iſſue Edward Courtney, his only ſonne, was attainted of high treaſon by the courſe of the common law in *anno* 31 H. 8. and in the ſame year was alſo attainted by act of parliament. Queen Mary by her letters patents bearing date 18th Sept. *anno* 1. *regni ſui*, granted the mannors of P and O, &c. in the county of Devon, &c. to

the

the ſaid Edward Courtney and his heirs: and afterwards 5 *Octobris* in the ſame year, at a parliament then holden, the ſaid Edward and his heires were from thenceforth by authority of that act reſtored and inabled only in blood, as well as ſonne and heir of the ſaid lord marquiſſe his father, as to all and every other collaterall and lineall anceſtor and anceſtors of the ſaid Edward. And that the ſeverall attainders againſt the ſaid lord marquiſſe for the attainder of the ſaid lord marquiſſe be not in any wiſe prejudiciall or hurtfull to the ſaid Edward or his heirs for the corruption of the blood only of the ſaid Edward, but that the ſeverall attainders and either of them be againſt him and his heirs for the corruption of blood only, utterly void. Provided always that the ſaid act, ne any thing therein contained, ſhould not in any wiſe extend to give any benefit or advantage to the ſaid Edward, ne to his heirs, to demand, claime, or challenge any honors, caſtles, &c. ne any other hereditaments whatſoever whereunto H. 8. and E. 6. or either of them was entituled, or ought to have and enjoy by reaſon of the ſaid ſeveral attainders of the ſaid late lord marquiſſe, or of either of them. Edward Courtney died ſeiſed of the ſaid mannors without iſſue, 18 Septemb. annis 3 and 4 Ph. & Mar. and Reinold Mohun, Alexander Arundell, John Vivian the younger, John Trelawny Eſq. and Margaret Buller widow, were his collateral couſins and heirs: and whether the ſaid reſtitution extended to the heirs collaterall of the ſaid Edward, was by the queens commandment referred to the conſideration of the two chief juſtices Popham and Anderſon, Peryam chief baron, and to Egerton attorny, and to the ſolicitor generall. And it was reſolved, that by reaſon of the attainder of the lord marquiſſe, if there had been no act of reſtitution, the heirs collaterall of the ſaid Edward could not have inherited to the ſaid Edward, in reſpect of the corruption of the blood wrought by the ſaid attainder only: hereupon it was objected, that when it was enacted by the ſaid act of reſtitution, that the ſaid Edward and his heirs ſhould be reſtored and inabled in blood only as ſonne and heir to his ſaid father, as all his anceſtors lineall and collaterall, that the ſaid reſtitution extended only to his heirs lineall, for other heirs he could not have as long as the ſaid attainders of the marquiſſe ſtood in force, and the words of the act of reſtitution to Edward and his heirs, might be ſatisfied with the heirs lineall. And upon due conſideration had of the caſe, it was *(una voce)* reſolved by them all, that corruption of blood is a diſtinct penalty inflicted by law; and that the ſaid act of reſtitution did extend to the heirs collaterall of the ſaid Edward, (having no heirs lineall) as to the cleering and reſtoring of the blood, and avoiding of the corruption thereof: and that it had been ſufficient if the act had reſtored and enabled him in blood only as heir to his father, thereby he and his heirs, as well collaterall as lineall, might make their deſcent or reſort from the marquiſſe (for there was the ſtop and corruption) and from all other the anceſtors of the ſaid Edward, lineall or collaterall, and *ex abundanti* the other clauſe alſo is added, for the more manifeſtation hereof.

Mic. 35 & 36 El.

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Margaret Plantagenet was daughter to George duke of Clarence attainted of high treaſon by act of parliament 17 E. 4. and ſiſter of Edward earl of Warwick, only ſonne of the ſaid George, and Iſabel eldeſt daughter of Richard Nevil earle of Warwick and Saliſbury; which

which Edward was attainted of high treaſon in *anno* 15 H. 7. before John Earle of Oxford then being high ſteward of England. The ſaid Margaret was by act of parliament *anno* 5 H. 8. reſtored to the ſtyle, ſtate, name, title, honour, and dignity of the counteſſe of Saliſbury, (ſhe was the laſt of the firname of Plantagenet) which act is very well penned, and worthy the reading for many reſpects, and the preamble thereof, *inter alia*.

Statute de 5 H. 8. not in print.

14 R. 2. nu. 36.

Bils of reſtitution may begin in the parliament, either in the houſe of commons, or in the lords houſe.

[a] There be alſo other kinds of reſtitutions to be treated of amongſt the pleas of the crown, as reſtitution of goods upon an appeal, whereof you ſhall reade in Stanford with this addition. Vide lib. 5. fo. 110. a. 21 E. 4. 10.

[a] Rot. par. 28 E. 1. nu. 11. of Liberties. Stanf. pl. cor. fo. 165, 166, 167. 186. 66. 105. 107. F. N. B. 66. a.

[b] And by the ſtatute of 21 H. 8. cap. 11. reſtitution is to be granted upon an indictment, &c. For by the common law the party ſhould not be reſtored to his goods upon an indictment (becauſe it is the ſuit of the king) albeit the enqueſt found that the party had made freſh ſuit. But reſtitution was to be made upon an appeal which is the ſuit of the party.

[b] 21 H. 8. cap. 11. 22 E. 3. cor. 460.

See Stanford alſo fo. 167. a. b. whereunto you may adde Lib. 5. fo. 110. a. & Lib. 6. fo. 80. where you ſhall finde, that though this ſtatute of 21 H. 8. ſpeak only of the party robbed, yet his executors are within the ſtatute, and ſo are his adminiſtrators. For it is a beneficiall law, and giveth a more ſpeedy remedy to the party robbed, &c. then the common law gave by way of appeale, and therefore ought to be conſtrued beneficially.

Stanf. 167. a. b. Lib. 5. fo. 110. Lib. 6. fo. 80.

Vide the Regiſter, 68. b. that in ſome caſes when the king ought *ex merito juſtitiæ* to make reſtitution to the party: yet for the honour of the king the writ ſaith, *Sine dilatione, reſtituas de gratia noſtra ſpeciali*, which derogate nothing from the right of the ſubject, when right is accompanied with grace.

F. N. B. 66. a. 8 E. 2. tit. Forfeiture 34. 3 E. 3. cor. 365. Vid. 40 E. 3. 42. lib. 5. fo. 110. Hoſtons caſe.

Laſtly, there are other lawes concerning reſtitutions of another kind. [c] As by the ſtatute of 8 H. 6. reſtitution is to be made, when he that hath any eſtate of inheritance or freehold is diſſeiſed by forcible entry or forcible deteyner. [d] By the ſtatute of 31 Eliz. there ſhall be no reſtitution by the ſtatute of 8 H. 6. upon an indictment of forcible entry or forcible deteyner, where the defendant hath been three whole years together before the day of ſuch indictment [e] in quiet poſſeſſion, and his eſtate not ended, according to the true meaning of a proviſo in the ſaid ſtatute of 8 H. 6. as it is declared by the ſaid act of 31 Elizabeth.

[c] See the ſecond part of the Inſtit. cap. 8. H. 6. cap. 9.

[d] 31 Eliz. cap. 11. Vide 4 Mariæ,

[e] Dier 141.

By the ſtatute of 21 Jac. regis, ſuch judges, juſtices, or juſtice, as are enabled to give reſtitution of poſſeſſion unto tenants of any eſtate * of freehold, &c. ſhall by reaſon of this act of 21 Jac. have the like and the ſame authority upon indictment of ſuch forcible entries or forcible with-holdings before them duly found, to give like poſſeſſion unto tenant for years, tenant by copie of court roll, guardens by knights ſervice, tenants by elegit, ſtatute merchant, or by ſtatute ſtaple.

21 Jac. cap. 15. By the ſtatute of 8 H. 6. cap. 9.

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And for as much (as it hath been ſaid) no reſtitution ought to be made where the defendant or party indicted in caſe of freehold hath been in poſſeſſion by the ſpace of three whole years, &c. they having the like and ſame authority in caſe of tenant for years, tenant by copie of court roll, and other the tenants above named, cannot

cannot give reſtitution or poſſeſſion, where the party indicted hath been in quiet poſſeſſion by the ſpace of three whole years. *Nota*, this act of 21 Jac. extends not to a garden in ſoccage, nor to a garden or keeper of a park: neither (as ſome hold) doth it extend to him, that by a laſt will hath an intereſt in lands or tenements untill debts and legacies be paid, becauſe certain tenants be particularly nominated, and this is *caſus omiſſus*. But this being a beneficiall law to reſtore him, that right hath, to his poſſeſſion of lands, &c. whereof he was wrongfully by force diſpoſſeſt, or by force withholden, &c. and being in like caſe in equall miſchief, others do hold, that this act extendeth to this caſe of ſuch a deviſee, &c. and ſo it is for a tenant for a year, or for an halfe, or three quarters of a year.

See the ſtatute of 32 H. 8. cap. 3. where the particular tenant charged with more then the land is worth, may after his term expired hold over untill he be ſatisfied, &c. in equall caſe with ſuch a deviſee.

* *Nota*, there be divers preſidents in the chancery for reſtitution by writ to be made after execution upon a ſtatute ſtaple.

* Reſtitution of another kinde, whereof we remember no book caſe.

Anno 25 H. 6. Execution was ſued upon a ſtatute ſtaple, and for that no certificat of the ſtatute, &c. appeared of record, the conuſor had a writ of *ſuperſedeas* out of the chancery with reſtitution to be made; and the forme of this writ appeareth in a Regiſter M. S. in the chancery.

In the caſe of Sir Robert Gardner in the time of Sir Thomas Bromley lord chancellor, after a *ſuperſedeas* granted, execution was done upon a ſtatute ſtaple, whereupon a *ſuperſedeas* was granted with reſtitution reciting the ſpeciall matter.

There is another preſident in 33 Eliz. in the caſe of one Carrant, (but there the writ recited no ſpeciall cauſe, but *pro diverſis cauſis et conſiderationibus,*) a *ſuperſedeas* with reſtitution was awarded.

THE EPILOGUE.

THUS have we by the great goodneſſe of Almighty God, *per varios caſus, per tot diſcrimina rerum*, brought this work concerning high treaſon, and other pleas of the crowne, or criminall cauſes, and of pardons, and reſtitutions, to a concluſion: wherein (as we are verily perſwaded) we have made it apparent from the lively voice of the lawes themſelves, that no country in the Chriſtian world have in criminall caſes, of higheſt nature, laws of ſuch expreſſe and defined certainty, and ſo equall between the king and all his ſubjects, as this famous kingdome of England hath, being rightly underſtood, and duly executed, to the great honour of the king, and of the laws, and the happy ſafety of all his loving and loyall ſubjects.

Now ſeeing *juſtitia eſt duplex*, viz. *ſeverè puniens, et verè præveniens*: that is, juſtice ſeverely puniſhing, whereof we have ſpoken, and truly

Juſtice divided.

truly preventing, or preventing juſtice, *(quæ adhuc deſideratur)* for we have ſpoken onely of the former; wee will therefore at this place (for a concluſion) point at the other with a direction how it may be effected.

True it is, that we have found by wofull experience, that it is not frequent and often puniſhment that doth prevent like offences, *Melior eſt enim juſtitia verè præveniens, quam ſeverè puniens*, agreeing with the rule of the phyſitian for the ſafety of the body, *Præſtat cautela, quam medela:* and it is a certain rule, that *Videbis ea ſæpe committi quæ ſæpe vindicantur;* thoſe offences are often committed, that are often puniſhed: for the frequency of the puniſhment makes it ſo familiar as it is not feared. For example, what a lamentable caſe it is ſo ſee ſo many Chriſtian men and women ſtrangled on that curſed tree of the gallows, inſomuch as if in a large field a man might ſee together all the Chriſtians, that but in one year, throughout England, come to that untimely and ignominious death, if there were any ſpark of grace, or charity in him, it would make his heart to bleed for pity and compaſſion. (But here I leave to divines to inform the inward man, who being well informed, *verbo informante*, the outward man will be the eaſilier reformed, *virga reformante.)*

Regula.

Sta, perlege, plora.

Seneca li. 1. De Clem. cap. 24. *Non minus principi turpia ſunt multa ſupplicia, quam medico multa funera.*

Regula.

Non morbus pleriſque, ſed morbi neglecti curatio corpus interficit.

This preventing juſtice conſiſteth in three things. Firſt, in the good education of youth, and that both by good inſtruction of them in the grounds of the true religion of Almighty God, and by learning ſome knowledge or trade in their tender years, ſo as there ſhould not be an idle perſon, or a * begger, but that every childe, male or female, whoſe parents are poor, might at the age of ſeaven years earn their own living: for *ars ſit quod à teneris primum conjungitur annis:* and this, for the time to come, would undoubtedly by preventing juſtice avoid idleneſſe in all, (one of the foul and fatall channels that lead into *mare mortuum)* and by honeſt trades cauſe them to become good members in the common-wealth.

* Deut. 15. 4. *Non erit omnino indigens & mendicus inter vos, ut benedicat tibi Dominus.*

Otioſus nihil cogitat niſi de ventre, et venere.

Secondly, in the execution of good laws: True it is that there be good laws already to puniſh idleneſſe, but none of ſufficient force or effect to ſet youth, or the idle on work.

Thirdly, that foraſmuch as many doe offend in hope of pardon, that pardons be very rarely granted, for the reaſons in the chapter of pardons expreſſed.

See before ca. of Pardons fo. 236.

But the conſideration of this preventing juſtice were worthy of the wiſdome of a parliament, and in the mean time expert and wiſe men to make preparation for the ſame, as the text ſaith, *ut benedicat eis dominus.* Bleſſed ſhall he be that layeth the firſt ſtone of this building, more bleſſed that proceeds in it, moſt of all that finiſheth it, to the glory of God, and the honour of our king and nation.

Pſal. 58. 11. *Miſericordia domini præveniet me.* 1 Maccab. 6. 27. *Niſi præveneris illis, majora quam hæc facient et non poteris eos obtinere.*

3 & 4 E. 6. ca. 5. in the preamble. *Imprimis intereſt reipublicæ, ut pax in regno conſervetur, & quæcunque paci adverſentur, provide declinentur.* 1 Mar. cap. 12. 32 H. 8. ca. 9. See the fourth part of the Inſtitutes, fo. 312. b.

Et pergrata Deus nobis hæc otia fecit,
Optimus eſt patriæ jura referre labor.

Deo gloria, et gratia.

FINIS.

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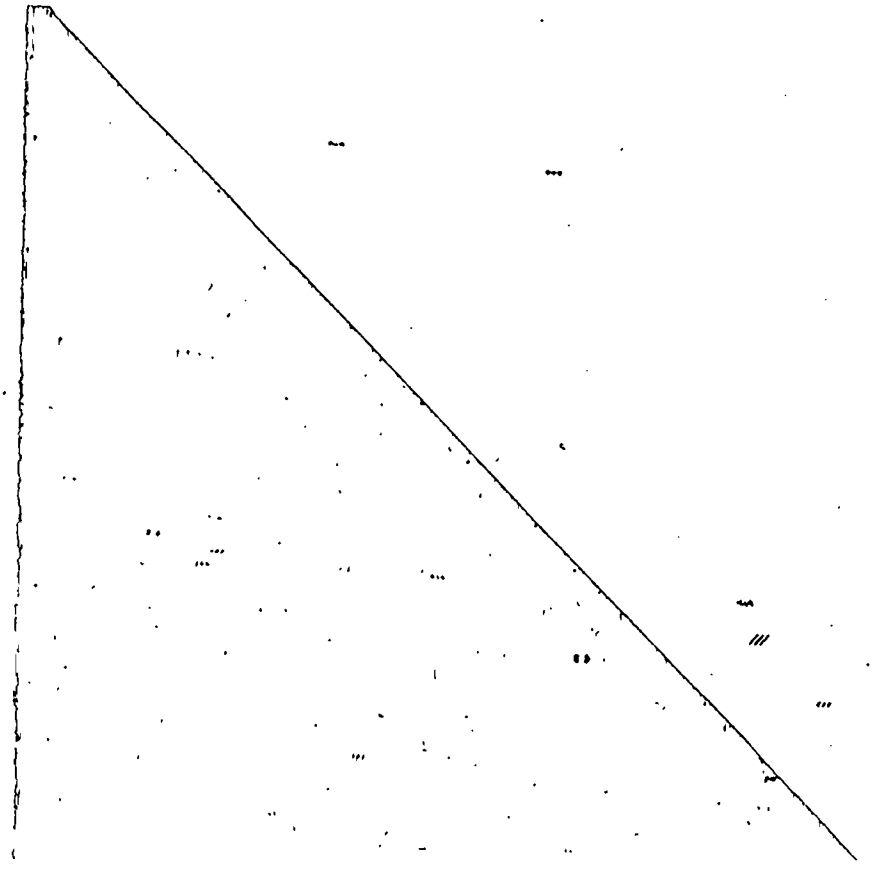

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